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Security and Liberty, Transparency and Secrecy.
Parliamentary Control of the Secret Services in Canada and Germany:
A Comparative Approach

Sophie Christine Barbara Wiesehofer

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Abstract

After an ongoing 40-year debate, Canada is going to institutionalise its first Committee of Parliamentarians that is meant to control the federal agencies' and departments' activities in the realm of national security. In contrast, post-war democratic Germany discussed that kind of control early on, not least because of its totalitarian past, and had already established its first parliamentary control body as of 1949; its last major reform was in 2016. Adopting a combined historical and comparative legal perspective, the thesis aims at analysing and comparing the constitutional frameworks and the respective debates and institutions in both countries, inter alia, with the help of scholarly works and official documents. It poses the question: can Canada make use of the German experience? It concludes that the final answer depends on an appreciation of the legitimate constitutional limits that differ between the two countries as well as on the reader's own political philosophy of the relationship between security and liberty, transparency and secrecy.

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Table of Contents

Abstract	ii
Acknowledgements.....	iii
Table of Contents.....	iv
Introduction.....	1
Chapter I: Germany: A Story of Scandals and Reforms. Parliamentary Control and National Security Matters between 1949 and 2017	4
I. Legal Concepts	4
II. National Security	7
1. National Security vs. Liberty?	7
2. German Intelligence Agencies	9
a) Federal Intelligence Service (Bundesnachrichtendienst, “BND”)	10
b) Military Counterintelligence Service (Militärischer Abschirmdienst, “MAD”)	13
c) Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, “BfV”)	13
d) GETZ, GTAZ, GIZ	14
3. Control Mechanisms	16
a) Different Mechanisms of Executive Control	17
Legal, Administrative and Subject-specific Supervision.....	17
Federal Audit Office (Bundesrechnungshof)	18
Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte(r) für den Datenschutz und die Informationsfreiheit)	18
The Commissioner for the Federal Intelligence Services (Beauftragter für die Nachrichtendienste)..	19
b) Parliamentary Control Mechanisms.....	19
Parliamentary Claims to Information.....	19
The Defence Committee, the Committee on Internal Affairs, the Budget Committee of the Bundestag (Verteidigungsausschuss, Innenausschuss, Haushaltsausschuss des Bundestages)	21

Committee on Petitions (Petitionsausschuss).....	21
Committee of Inquiry (Untersuchungsausschuss).....	22
Parliamentary Trust Body (Vertrauensgremium).....	23
The Art. 13 IV-Panel (Gremium nach Art. 13 VI GG).....	24
c) Control sui generis.....	24
The G10 Commission (G 10-Kommission)	24
Independent Body (Unabhängiges Gremium)	26
d) Control by the Media and Civil Society	27
e) Judicial Control	28
III. The Role of the Federal Constitutional Court	29
1. Constitutional Guarantee of Judicial Review	29
2. Requirement of Judicial Decree: Art. 13 III–V of the <i>Basic Law</i> (<i>Richtervorbekalt</i>)	29
3. The Role of the Federal Constitutional Court	29
4. The Court's Influence on the Shaping of Parliamentary Control and National Security Law.....	30
5. New Leading Case Law in the Field of National Security Law.....	31
IV. Parliamentary Control and National Security Agencies.....	34
1. Parliamentary Control – in Theory	34
2. The Parliamentary Control Panel (<i>Das Parlamentarische Kontrollgremium</i> , “PKGr”)	37
a) Historical Overview	37
Committee for the Protection of the Constitution (Ausschuss zum Schutz der Verfassung, “ASchutzV”), 1949	37
The Parliamentary Board of Trustworthy People (Das Parlamentarische Vertrauensmännnergremium, “PVMG”), 1956.....	38
Pätsch-Affair/Phone-Affair, Reform 1964.....	39
Reform 1968/1969	39
Enquête Commission, Reform 1973-1976	40
Parliamentary Debate and Bill, 1977-1978.....	41
The Parliamentary Control Commission (Die Parlamentarische Kontrollkommission, “PKK”), 1978..	42

The Reform of the PKK Act in 1992	45
The fundamental reform of the PKK Act in 1999 – The PKK becomes the Parliamentary Control Panel (Parlamentarisches Kontrollgremium, “PKGr”).....	48
Bills 2006-2009.....	51
New Art. 45d in the Basic Law	52
b) Status Quo: Fundamental Reform of 2009 & Reform in 2016	53
The Reform of 2009	53
Reform in 2016	57
V. The Influence of the European Union (“EU”) and the European Court of Human Rights (“ECtHR”) on the Architecture of Parliamentary Control in Germany.....	62
1. Influence of the Council of Europe (“CoE”) and the European Court of Human Rights (“ECtHR”)	62
2. Influence of the European Union (“EU”)	68
Chapter II: Canada: The Long Path to Bill C-22. Parliamentary Control and National Security Matters between 1969 and 2017.....	74
I. Legal Concepts	74
II. National Security	77
1. Tensions.....	77
2. Leading Canadian National Security Agencies	78
a) Royal Canadian Mounted Police (“RCMP”).....	78
b) Canadian Security Intelligence Service (“CSIS”)	78
c) Communications Security Establishment of Canada (“CSEC” or “CSE”).....	79
3. Control Mechanisms	79
a) Special Bodies for the Intelligence Agencies	79
RCMP Civilian Review and Complaints Commission (“CRCC”)	79
Security Intelligence Review Committee (“SIRC”)	80
CSIS Office of the Inspector General (Abolished)	81
Communications Security Establishment Commissioner	81
b) Other (Executive) Control Mechanisms.....	82

Ministerial Supervision	82
The Prime Minister's National Security Advisor (Privy Council Office).....	82
Privacy Commissioner (Officer of Parliament)	83
Office of the Auditor General	83
Ad hoc Commissions of Inquiry	83
c) Parliamentary Control Mechanisms	84
III. Parliamentary Control and National Security.....	84
1. (Parliamentary) Control in Theory	84
2. The new National Security and Intelligence Committee of Parliamentarians ("NSICOP" or "the Committee")	85
a) Historical Overview	85
MacKenzie Commission, 1969.....	85
MacDonald Commission, 1979.....	86
Special Senate Committees, 1999 & 2011	87
Paul Martin Government Plan and Interim Committee of Parliamentarians.....	89
Arar Commission	90
Air India Commission	91
Afghan Detainees.....	91
Senate Committee, 2011	92
Bills 2005-2016.....	93
b) Status Quo: Bill C-22, An Act to Establish the National Security and Intelligence Committee of Parliamentarians.....	95
IV. Influence of the Five-Eyes Membership.....	99
Chapter III: Parliamentary Control of the Agencies in Canada and Germany: A Comparative Approach.....	100
I. Necessity of Intelligence Agencies	100
II. Access to Information	102
III. Information to the Public.....	114
1. Dissenting Opinion (<i>Sondervotum</i>) in Special Reports	114

2. (Bi-) Annual Reports	115
3. Annual Public Official Hearings.....	116
IV. Digital World	117
V. Review and Oversight.....	118
VI. Minority Rights	120
VII. “Partisan Motivations”?.....	124
VIII. Whistle-blowers	126
IX. More for More.....	129
X. The Power of Sanctions	130
XI. Information Sharing.....	133
XII. Sharing of Intelligence.....	134
XIII. Public Information/Publicity/Reputation.....	137
XIV. Effectiveness of the Parliamentary Control Mechanisms.....	138
Conclusion	141
Bibliography	150
I. Secondary Sources	150
II. Newspaper Articles and Blogs.....	155
III. Parliamentary Publications.....	158
IV. Non-Parliamentary Publications	162
V. Jurisprudence: Canada	163
VI. Jurisprudence: European Court of Human Rights.....	164
VII. Jurisprudence: European Union.....	165
VIII. Jurisprudence: Germany	165
IX. Legislation:Canada	166
X. Legislation: Council of Europe.....	167
XI. Legislation: Germany	167
XII. Legislation: European Union	168
XIII. Other Sources.....	169

Introduction

*"If you always ask for possible additional measures and forget the connection with the constitution of society as a whole, a dangerous gate is opened. [...] 'Anyone who has nothing to hide has nothing to fear'—this is a slogan that has always been used for 'security reasons' in every totalitarian state of the world. For 'security' is an open-ended demand—always boundless: it is, if one limits its sense to control and persecution, a totalitarian concept. You could still do a lot more [...]."*¹ – Thomas Fischer, Former Presiding Judge of the 2nd Criminal Division of the German Bundesgerichtshof (Federal Court of Justice)

In recent years, the call for more security and protection against terrorism has become a predominant feature of the political debate in all 'western' countries. The mass surveillance that became known after the whistle-blowing of Edward Snowden changed the national security policies of the governments only very briefly as the collection of data and the global collaboration of intelligence services in their hunt for personal data and the tracking of threats to the welfare of the states seemed too important. Whereas the rights granted to the intelligence and secret services around the world are growing, only small steps have been taken to keep the balance between security and liberty—the principle on the other side of the coin.

On June 2016, however, a step towards liberty and an improved protection of fundamental rights was taken by the Canadian Liberal government when it tabled a new Bill: *Bill C-22*—'an Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts' [*Bill C-22*].² Whereas in most 'western' democracies a body conducting parliamentary control in the realm of national security was already established years—if not decades—ago, Canada is only on its way to establishing its first respective Committee of Parliamentarians and to make the executive accountable to Parliament in this way for the executive's activities with regards to national security. Even though the first official recommendation for an inquiry to establish such

¹ "Wenn man immerzu nur nach dem möglichen Mehr an Maßnahmen fragt und dabei den Zusammenhang mit der Verfassung der Gesellschaft insgesamt vergisst, öffnet man ein gefährliches Tor. [...] "Wer nichts zu verbergen hat, muss auch nichts befürchten" – das ist eine Parole, mit der von jeher in jedem totalitären Staat der Welt für "Sicherheit" gesorgt wurde. Denn "Sicherheit" ist eine nach oben offene Forderung – immer unermesslich: Sie ist, wenn man ihren Sinn auf Kontrolle und Verfolgung beschränkt, ein totalitärer Begriff. Man könnte ja immer noch unendlich viel mehr tun [...]." (Translation mine). Thomas Fischer, "Sicherheit und Sinn", *Zeit Online* (21 June 2017), online: www.zeit.de/2017/26/ueberwachung-innere-sicherheit-innenminister-deutschland.

² Bill C-22 received Royal Assent following the Senate's adoption of the House Bill in June 2017.

a committee was made as early as in 1983 and several bills aiming at the establishment of a body were tabled after 9/11, it was only after the introduction of one of the most controversial and far-reaching anti-terrorism Laws (Anti-terrorism Act, 2015) that the general proposal to establish such a Committee had its first real chance of success.

Germany is an example of a country that established a parliamentary control body long before the threat of the new fundamentalist terrorism emerged. Since then, it has reformed its body repeatedly. The first steps to the current Parliamentary Control Panel were taken as early as in 1949, when the Committee for the Protection of the Constitution was established. In 1978, only a few years before the first official recommendation to create a somehow similar committee in Canada, the Parliamentary Control Commission was established in Germany—the direct predecessor of the current Panel. Since Germany's experiences with parliamentary control of the national security agencies have been both positive and negative in the last 40 to 70 years, those lessons might assist the current debates in Canada on *Bill C-22*. This thesis therefore deals with the following question: *(What) can Canada learn from the German model and the European standards of parliamentary control of secret services with respect to the composition, powers, and roles of the National Security and Intelligence Committee of Parliamentarians that has been established by Bill C-22?*

The relationship between security and liberty is still a heated public controversy in both states. Besides, it should be of interest to every citizen. The introductory quote of Thomas Fischer, who was the Presiding Judge of the 2nd Criminal Division of the German Bundesgerichtshof (Federal Court of Justice) until April 2017, highlights that the idea that anyone who has nothing to hide has nothing to fear from supervision measures may lead to an encroachment of the executive branch of the state into every aspect of everyone's private life. This is something that not only frightens me personally but has also led me to choose this topic for my thesis.

To be in a position to compare the German Panel and the legislation that underpins the Panel with the Canadian Committee and the final version of *Bill C-22*, it is necessary to describe the different constitutional frameworks in which the Committee or Panel will be/is embedded in detail. Additionally, the debates that have led to the current ideas and plans in Canada and to the reforms in Germany need to be explained. Only then are we able to assess the reasons why certain ideas, plans, advances, reluctances and hesitations came into being in both Canada and Germany. Therefore, this thesis starts by giving a detailed overview of the German constitutional and statutory background as well as the reforms of and debates on the parliamentary control architecture in Germany (as far as compatible with the length of the thesis) (chapter 1). As a second step, the long Canadian path to *Bill C-22* will be portrayed by giving a short introduction to the relevant Canadian constitutional and statutory framework (chapter 2). Only on the basis of these explanations is it possible to compare the Canadian and German model—through an analysis of their respective characteristics, based, inter alia, on assessments and considerations made by various scholars and politicians. It will become clear that despite their differences regarding their Constitutions, (legal) history and experiences with

parliamentary control, the debate in both Canada and Germany focusses on the same problems, challenges and tensions. The comparison can therefore also centre on those common issues/questions such as access to secret information, review and/or oversight powers, protection of whistle-blowers, minority rights, information sharing and the influence of the digital world on the debates (chapter 3). Finally, I will explain why the reader has to draw his/her own conclusions and why it is impossible to draw or present a politically neutral conclusion within the limits of what is constitutionally acceptable in both countries. I will set forth the reasons why I believe that *Bill C-22* still lags behind the German model in several respects despite of the latter not being effective and far-reaching enough. I will especially emphasise the underdeveloped minority rights, the unsolved problems of intelligence sharing, and the lack of sanction powers. I will explain why the debate has not yet and will not come to an end, particularly when considering the technical/digital developments and other new challenges that the parliamentary control bodies in both countries will face—in my opinion, highly unprepared (conclusion).

Chapter I: Germany: A Story of Scandals and Reforms. Parliamentary Control and National Security Matters between 1949 and 2017

“Dadurch, dass er [sc. der Rechtsstaat] auch den Umgang mit seinen Gegnern den allgemein geltenden Grundsätzen unterwirft, zeigt sich gerade die Kraft dieses Rechtsstaats [...]. Das gilt auch für die Verfolgung der fundamentalen Staatszwecke der Sicherheit und des Schutzes der Bevölkerung.”³ – German Constitutional Court, First Senate, 2006⁴

In 2013, the United States National Security Agency (NSA) scandal⁵ provoked a highly controversial debate in Germany—mostly on digital rights and mass surveillance committed by, as we know now, all major western intelligence agencies, including the German ones. Was the NSA spying scandal a sign of failure of the so-called *checks and balances* or are the activities of the intelligence agencies backed in any case by the will of the people, not least by their fear of terrorism? If so, in which way does/can the will of the people as the sovereign still play an effective part in security policies? Through its representative, the parliament? This chapter seeks to give a broad overview and historical survey of the German security architecture, particularly the role of the Parliamentary Control Panel of the German intelligence services. What role has it played so far, how has its role developed and which powers has it had and does it have today?

I. Legal Concepts

In order to understand the current security structure or ‘security architecture’ in Germany, one needs to, first of all, define the legal concepts that determine why, how and within which legal framework the security agencies and the (parliamentary) control bodies operate. According to its *Basic Law*, Germany is a federal republican and democratic state governed by the rule of law⁶. These principles are considered as defining constitutional principles of the German

³ “The fact that it [sc. the state governed by the rule of law] also subjects its dealings with its opponents to the generally applicable principles is precisely what demonstrates the power of this constitutional state. ... This also applies to the pursuit of the fundamental state purposes of security and protection of the population.” (Translation mine).

⁴ *Rasterfabndung II*, BVerfGE 115, 320 at 358, cited in Franz Josef Lindner & Johannes Unterreitmeier, “Die ‚Karlsruher Republik‘ – wehrlos in Zeiten des Terrors?” (2017) 3 DÖV 90 at 94.

⁵ Whistleblower Edward Snowden published documents of the NSA that revealed its practice of keeping citizens all around the world under surveillance – tapping particularly the internet and telecommunications, including of foreign leaders, for example German chancellor Angela Merkel.

⁶ Art. 20 of the Basic Law / Art. 28 of the Basic Law, *Grundgesetz*, Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 23 December 2014, Federal Law Gazette I, 2014 at 2438 [GG].

state (*Staatsstrukturprinzipien*). Furthermore, they are protected by the so-called eternity clause (*Ewigkeitsklausel*)⁷, meaning that they cannot be amended or abolished by anyone or any institution.

The concept of democracy is *inter alia*⁸ defined more precisely by Art. 20 II of the *Basic Law* that prescribes that

“[a]ll state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”⁹

Considering this wording, Germany is defined as a parliamentary or representative democracy, meaning that the “democratic sovereignty of the people [...] is executed by the democratically legitimised governmental bodies.”¹⁰

The will of the people should therefore be the foundation of every exertion of power by the state. This also becomes obvious when we think of the “continuous democratic chain of legitimacy”¹¹, a notion coined by Böckenförde, which states that every state’s act should always be traceable back to the will of the people. A precondition for the people acting as the sovereign of the state is their ability to form their opinions and views in an uncoerced and free manner. In order to be able to do so, however, the people must be informed about the actions of the government. Therefore, one requirement of the democratic process is transparency to a certain degree and publicity of the government’s assertions of powers. There is some kind of interdependence between publicity and the will of the people.

Grzeszick thus describes two steps that need to be distinguished. Firstly, the “general principle of a democratic public has to be made concrete and compact to become a legal rule. [...] The specification into a relevant legal rule thus depends on the democratic public opinion’s view of the significance of the respective governmental activity.”¹² If the principle of a democratic public is considered as a legal rule for a certain governmental activity, the second step is to see whether “partial deviations from the legal rule can be justified for corresponding reasons”.¹³ This second “step” may become very important particularly within the framework of the exertion of powers by the government in the field of national security and—arguably—for the review of activities conducted by the state’s intelligence agencies.

In Germany, the principle of the separation of powers is not enshrined in the constitutional system in Art. 20 II 2 of the *Basic Law* but is considered as part of the principle of a state governed by the rule of law. There is, however, no

⁷ Art. 79 III *GG*.

⁸ The principle of democracy is more closely defined in different articles of the Basic Law, which, however, will not be looked at in the context of this thesis.

⁹ Art. 20 II *GG*; English translation, online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹⁰ “[D]emokratische Volkssouveränität in der grundsätzlichen Ausübung durch demokratisch legitimierte Staatsorgane.” (Translation mine). Bernd Grzeszick, “Die Verfassungsentscheidung für die Demokratie” in Theodor Maunz & Günter Dürig, eds, *Grundgesetz-Kommentar*, 78th edition (Beck Online, January 2010) at paras 11-15.

¹¹ “Ununterbrochene demokratische Legitimationskette.” (Translation mine). Ernst-Wolfgang Böckenförde, “Demokratie als Verfassungsprinzip” in Josef Isensee & Paul Kirchhof, eds, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* at § 24 paras 16ff.

¹² “Das allgemeine Prinzip der demokratischen Öffentlichkeit muss zu einer Rechtsregel konkretisiert und verdichtet werden. [...] Die Konkretisierung zu einem einschlägigen Rechtsgebot hängt deshalb zunächst davon ab, wie wichtig die jeweilige staatliche Tätigkeit aus der Sicht der demokratischen Willensbildung ist.” (Translation mine). Grzeszick, *supra* note 10 at paras 11-21.

¹³ “[...] partikuläre Abweichungen von der Rechtsregel durch entsprechende Gründe zu rechtfertigen.” (Translation mine). *Ibid* at paras 21 – 22.

strict separation of powers; instead, one talks about the so-called “*Gewaltenverschränkung*”, meaning that there is an interlinking of powers of the three branches of the state—in the form of “mutual influence, control and inhibition”¹⁴. Within the framework of this thesis, the interlinking is particularly important when we have a closer look at the relationship between the executive power and the legislative power: “A government that is independent in some (core) areas but subject to parliamentary control in others is a mandatory feature of a parliamentary system of government.”¹⁵

This brings us to parliamentary control and its necessary components. When considering parliamentary control, Gusy defined it as “an essential link between the separation of powers and the principle of democracy.”¹⁶ It is essential to achieve firstly, “power limitations”¹⁷, secondly, “the participation of the parliament in the democratic decision-making process and the ‘Management of the State’”¹⁸ as well as thirdly, “an increase in performance and efficiency.”¹⁹ Parliamentary control is therefore, in Gusy’s view, not an “expression of a particular mistrust against the executive or certain public authorities.”²⁰ Furthermore, Gusy makes another point in favour of the effects and aims of parliamentary control: the legitimacy that originates from formal legislation is rather weak when legislation is using vague legal terms. Therefore, parliamentary control of the exercise of power by the executive in the vague field of discretionary power may have “an effect that compensates legitimation.”²¹ It is to be understood not only within the framework of the relationship between parliament and government but also as a control mechanism significant for the relations between the parliament, which meets openly, and the public²² by emphasising the importance of transparency and publicity in a democratic state once again.

However, there is a scholarly debate on how to locate parliamentary control in the framework of the constitutional principles of democracy and the rule of law in Germany. A majority of scholars sees parliamentary control founded on both principles (see above). However, it is indeed disputable whether it is a democratic feature because of its necessary link to the sovereignty of the people or to the “idealistic form of democracy”, i.e. direct democracy, and

¹⁴ “[...] gegenseitige Beeinflussung, Kontrolle und Hemmung.” (Translation mine).

Erik Hansalek, *Die parlamentarische Kontrolle der Bundesregierung im Bereich der Nachrichtendienste* (Frankfurt: Lang, 2006) at 197.

¹⁵ “Eine sogleich in einigen (Kern-)Bereichen eigenständige, als in anderen Bereichen der parlamentarischen Kontrolle unterworfenen Regierung ist ein zwingendes Merkmal für ein parlamentarisches Regierungssystem.” (Translation mine). Hannes Berger, *Dimensionen parlamentarischer Kontrolle: Eine Einführung in Theorie und Empirie* (Stuttgart: ibidem, 2014) at 6.

¹⁶ “In diesem Sinne ist parlamentarische Kontrolle ein zentrales Bindeglied zwischen Gewaltenteilung und Demokratieprinzip.” (Translation mine). Christoph Gusy, “Parlamentarische Kontrolle der Nachrichtendienste im demokratischen Rechtsstaat” (2008) 41:2 *Zeitschrift für Rechtspolitik* 36 [Gusy, “Parl. Kontrolle”].

¹⁷ “Machtbegrenzung” (Translation mine). Hansalek, *supra* note 14 at 150.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Gusy, “Parl. Kontrolle”, *supra* note 16 at 37.

²¹ “legitimationskompensierende Wirkung.” *Ibid* at 38.

²² Daniel Nees, “Wieviel Demokratie vertragen unsere Außenbeziehungen?” (2016) 16 *DÖV* 674 at 676.

thus to the necessity to counterbalance the impacts of having an indirect and representative democracy in the German constitution.²³ Irrespective of the debate, there have always been certain limits to the powers of the Bundestag and thus to the rights of the parliament and the public to be informed of the government's actions. The Constitutional Court has defined these limitations in different cases, which can be classified into three categories: firstly, the Bundestag does not have the competence; secondly, the "core area of executive autonomy"²⁴ is affected; and thirdly, a disclosure would constitute a threat to the public weal/ welfare of the state.²⁵

II. National Security

Theoretically, the constitutional principles of democracy, of the partial separation of powers and thus of the parliamentary control of actions of the federal government need to be applied to every possible field of policy and public action. However, in the history of parliamentary control in the field of national security, it has often been contended that "it is obvious that the nature and tasks of the security agencies exclude the exertion of parliamentary control with the otherwise usual operating methods."²⁶ The question is, therefore: how can we guarantee that the activities of the intelligence agencies are properly accountable to parliamentary control and thereby operate with necessary legitimacy? How and to what extent should this control and its mechanisms be different from ordinary forms of (parliamentary) control? In what follows, I will provide a short overview of the German security agencies as well as the diverse review and accountability mechanisms that are in place. Additionally, I will outline the long history of parliamentary control of the federal government in the field of national security, its continuities and changes and its potentials and shortcomings.

1. National Security vs. Liberty?

In Germany, the literal translation of the English term national security (*Staatssicherheit/Nationale Sicherheit*) is not used by scholars or the public. Those terms are negatively connoted to NS²⁷ - as well as GDR²⁸ - times. Therefore, other legal terms are used in Germany and in German law to describe 'national security', the most prominent one being "internal and external security" (*Innere und Äußere Sicherheit*). The term *Innere Sicherheit* is, however, nowhere legally defined. Lampe argues that one should use the term "protection of the basic security interests" of the state

²³ Hansalek, *supra* note 14 at 174 ff.; The Basic Law does furthermore regulate specific control mechanisms for the government, e.g. in Art. 13 IV 2²³, 45 b²³ and 45 d.

²⁴ "Kernbereich exekutiver Eigenverantwortung." (Translation mine).

²⁵ Gunter Warg, "Die Grenzen parlamentarischer Kontrolle am Beispiel des Staatswohls" (2014) 19 NVwZ.

²⁶ "Es liegt jedoch auf der Hand, dass Wesen und Aufgaben der Nachrichtendienste die Ausübung der parlamentarischen Kontrolle mit den sonst üblichen Methoden und Arbeitsweisen ausschließen." (Translation mine). Germany, Deutscher Bundestag, *Enquete-Kommission, Verfassungsreform*, 7th Parl, BT-Drucksache 7/5924 (09 December 1976) at 61 [BT-Drucksache 7/5924], cited in Hansalek, *supra* note 14 at 3.

²⁷ National Socialism.

²⁸ German Democratic Republic.

instead (as already set out in Art. 65 (4), Art. 346 Treaty on the Functioning of the European Union, “TFEU”), since this term would not only include internal and external security but also the “security policy interests of the state”.²⁹

Yet the main constitutional problem is not terminology but the balancing of security and civil liberty. As Gusy puts it, “security is a condition of the constitution, freedom is its content.”³⁰ Nonetheless, they are often “working in opposite directions. Security is the absence of risks; freedom, however, causes and increases risks.”³¹ The biggest threat to limiting the liberty of each and every citizen in the name of security is the slow dismantling of standards of the rule of law and permanent encroachments on fundamental rights: “it is the authoritarian police state that does not regard its citizen as a subject of freedom but as a potential threat, as a ‘wolf amongst wolves’, who has to be tamed by a superior Leviathan. You find this political need in the constitutional disguise of a ‘fundamental right to security’”³² of the people.

And indeed, there are many discussions about the necessity of having this ‘fundamental right to security’. Thus, Borgs-Maciejewski lists the so-called “citizen demand for security”³³ as an unwritten fundamental right.³⁴ But what are we supposed to think about a new unwritten fundamental right that has never been articulated by the Constitutional Court or the Constitutional Legislative?³⁵ Instead, the Constitutional Court has even ruled in several major decisions in favour of the liberal fundamental rights of the citizens and has emphasised the importance of limiting the powers of the agencies to intrude into each citizen’s life. But as Gusy puts it, “state tasks are no longer defined solely by the rule of law, but also democratically. Thus, the need for security and the aspirations of the people can hardly be

²⁹ Joachim Lampe, “Die Schwierigkeiten mit der Rechtfertigung nachrichtendienstlicher Tätigkeit” (2015) 7 NSTz 361 at 363.

³⁰ “Sicherheit ist Verfassungsvoraussetzung. Freiheit ist Verfassungsinhalt.” (Translation mine). Gusy, Christoph, *Grundrechte und Verfassungsschutz* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2011) at 1 [Gusy, “Grundrechte“].

³¹ *Ibid.*

³² “Es ist der autoritäre Polizeistaat, der den Bürger nicht als Subjekt der Freiheit, sondern als potentielle Gefahr, als ‚Wolf unter Wölfen‘ ansieht, der durch einen übermächtigen Leviathan gebändigt werden muss. Verfassungsrechtlich verkleidet wird dieses politische Bedürfnis als ‘Grundrecht auf Sicherheit’.” (Translation mine). Peter-Alexis Albrecht, “Die Bedrohung der dritten Gewalt durch irrationale Sicherheitspolitik” (1998) DRiZ 329, cited in Fredrik Roggan, *Handbuch zum Recht der Inneren Sicherheit* (Bonn: Pahl-Rugenstein, 2003).

³³ “Bürgeranspruch auf Sicherheit.” (Translation mine).

³⁴ Hermann Borgs-Maciejewski, “Vertrauensbildung durch Kontrolle der Polizei und der Geheimdienste” (2006) 2 ZRP 41 at 43.

³⁵ In 2016, the European Court of Justice (ECJ), in a judgement regarding the Directive on the Retention of Data, mentioned in passing a fundamental right to security by referring to Art. 6 of the Charter of Fundamental Rights of the European Union (CFR). It remains, however, unclear whether the ECJ thereby wanted to give “security” in Art. 6 CFR an independent meaning and interpretation and thus to refer to it as a separate fundamental right. This would indeed be problematic as it would contradict the jurisprudence of the European Court of Human Rights (ECtHR) regarding Art. 5 (1) of the European Convention of Human Rights (ECHR) notwithstanding the existence of a so-called “convergence clause” (Konvergenzklausel) in Art. 52 (3) (1) CFR. Indeed, the ECtHR has so far not given the notion of security in Art. 5 ECHR a separate and independent interpretation from the notion of “freedom” in the same article. Security in the context of Art. 5 ECHR is “not to be understood in the sense of protection *by* but only *against* the state”. Therefore, no state may rely on the notion of security in the context of Art. 5 ECHR to encroach upon fundamental rights of the ECHR. (Sebastian Leuschner, “EuGH und Vorratsdatenspeicherung: Erfindet Europa ein Unionsgrundrecht auf Sicherheit?” (2016) EuR 431 at 433 (Leuschner’s emphasis), referring to ECtHR, *Altun v Turkey*, 24561/94, 01 June 2004 at para 57 and ECtHR, *Nikolaishvili v Georgia*, 37048/04, RJD 2009, 13 January 2009).

ignored in the competition of ideas and parties.”³⁶ This, however, is particularly dangerous when the “tasks of the state follow the logic of risk management and security thinking which tends to be indefinitely expansive. The constitutional starting point is thereby left behind.”³⁷ Instead of focusing on citizens as possible threats to security, there is good reason, as Singer argues, for acting on an assumption that “citizens are loyal to the Constitution”, as the “relationship between citizens and the state in a state governed by the rule of law is based on mutual trust.”³⁸ Thus, he concludes that one should not accept that intelligence services—because of the “tense relationship between liberty and security” — “are partially not controllable”.³⁹ Instead, since those agencies work in secrecy, it is even more important to have an effective control in place.⁴⁰ In order to be able to elaborate on the control mechanisms that the German laws provide for, it is important to know what kind of agencies need to be checked and controlled.

2. German Intelligence Agencies

The German intelligence services are considered to be, inter alia, a “manifestation of the basic decision of the *Basic Law* for a well-fortified democracy.”⁴¹ The intelligence architecture in Germany is called an “intelligence triad”⁴², since there are three kinds of agencies: the Federal Intelligence Service (“BND”: “*Bundesnachrichtendienst*”), the Federal Office for the Protection of the Constitution (“BfV”: “*Bundesamt für Verfassungsschutz*”) and the Military Counter-intelligence Service (“MAD”: “*Amt für den Militärischen Abschirmdienst*”).

It is noticeable that the German police or law enforcement agencies are not part of this triad. In Germany, the police have to be a separate agency (organisational separation) and are not supposed to take any action in intelligence matters, whereas the intelligence agencies do not have coercive powers like the police (functional separation) (Principle of Separation/ *Trennungsgebot*). The principle is based on the so-called “Police Letter” of 1949, when the Allies

³⁶ “Staatsaufgaben werden nicht mehr allein rechtsstaatlich, sondern auch demokratisch bestimmt. Sicherheitsbedürfnisse und -ansprüche der Menschen können im demokratischen Wettbewerb von Ideen und Parteien kaum ignoriert werden.” (Translation mine). Gusy, “Grundrechte”, *supra* note 30 at 6.

³⁷ “[...] vielmehr folgen die Staatsaufgaben der tendenziell unbegrenzt expansiven Logik von Risiko- und Sicherheitsdenken. Der rechtsstaatliche Ausgangspunkt ist damit verlassen.” (Translation mine). *Ibid.*

³⁸ “[...] geht der demokratische Rechtsstaat im Verhältnis Bürger-Staat-Beziehung von wechselseitigem Vertrauen aus. Es gilt grundsätzlich die Verfassungstreue des Bürgers.” (Translation mine).
Jens Singer, *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes: Kontrollgremiumgesetz - PKGrG* (Berlin/ Heidelberg: Springer, 2015) at 9.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Lampe, *supra* note 29 at 363; the notion of the “well-fortified democracy” (*webrbafte Demokratie*) describes one of the basic principles of the German Basic Law. Its main objective is the protection of the democratic principle in Germany (learning from past experiences in the Weimar Republic). The Constitutional Court calls it a “basic constitutional decision” (*Grundentscheidung der Verfassung*). Articles that describe the well-fortified democracy more closely are for example the eternity clause in Art. 79 III or the right of the Constitutional Court to prohibit a political party if its main objective is to end the democratic order in Germany (Art 21 II). Other Articles that are part of this basic decision of the Basic Law are the following: Art. 2 I, Art. 9 II, Art. 18, Art. 20 IV, Art. 21 II, Art. 79 III, Art. 91, Art. 98 II of the Basic Law. (*Radikalenbeschluss*, BVerfGE 39, 334).

⁴² Bernadette Droste, *Handbuch des Verfassungsschutzrechts* (Stuttgart: Boorberg, 2007) at 27.

allowed for the establishment of a national security agency that was, however, forbidden to have police powers.⁴³ Thereby, the concentration of power in one agency was to be prevented—having learned from the abuse of power in the Third Reich.

After the Census Judgement of the Constitutional Court⁴⁴, the legitimacy of data and information exchanges of the security agencies and the police was an area of debate before the requirements for those collaborations were mandated in the different acts of Parliament on the intelligence services.⁴⁵ The compliance with the so-called principle of purpose limitation (*Grundsatz der Zweckbindung*) has always to be ensured⁴⁶: “personal data should be collected and processed for specified and explicit purposes and their subsequent use may only be authorised in accordance with very strict conditions.”⁴⁷

Therefore, although it is disputed whether the principle of separation of intelligence and police is of a constitutional nature and thus not changeable by sub-constitutional law, the principle has prevailed in the 21st century and is now being mandated in §2 I 2 of the *Act on the Office for the Protection of the Constitution* (“*BVerfSch Act*”), § 1 I 2 of the *Act on the Federal Intelligence Service* (“*BND Act*”) and in § 1 IV of the *Act on the Military Counterintelligence Service* (“*MAD Act*”). However, due to several joint co-operations of different intelligence services (see below), it is more than ever doubtful whether the principle of separation has been complied with in the last twenty years and whether it will also prevail in the face of the global threats of terror and their implications for the German security architecture. There are increasingly voices⁴⁸ that also emphasise the importance of a strict distribution of tasks and of an arrangement of competences regarding the powers of the police and the intelligence agencies and their increasing cooperation. The massive problems of an unorganised division of authority and a non-efficient distribution of tasks became particularly apparent in the review of the NSU⁴⁹-scandal by a Committee of Inquiry.⁵⁰ In the following, I will give a short overview of the major federal intelligence services.

a) Federal Intelligence Service (Bundesnachrichtendienst, “BND”)

The BND is the oldest German intelligence agency. Its roots were the so-called “Organisation Gehlen” (Gehlen Organisation), an intelligence service that worked under American responsibility from 1946 onwards and had the task

⁴³ Kay Nehm, “Das nachrichtendienstliche Trennungsgebot und die neue Sicherheitsarchitektur” (2004) NJW 3289.

⁴⁴ *Volkszählung*, BVerfGE 65, 1 [*Volkszählung*].

⁴⁵ Nehm, *supra* note 43.

⁴⁶ *Volkszählung*, *supra* note 44.

⁴⁷ European Communities, Opinion of the European Data Protection Supervisor on the draft Council Regulation (EC) laying down the form of the laissez-passers to be issued to members and servants of the institutions (2006/C 313/13).

⁴⁸ E.g. Christoph Gusy, “Reform der Sicherheitsbehörden” (2012) 8 ZRP 230 [Gusy, “Sicherheitsbehörden”].

⁴⁹ *Nationalsozialistischer Untergrund (NSU)* – a right wing trio committing several murders and arson attacks between 1999 and 2007.

⁵⁰ Germany, Deutscher Bundestag, 2. Untersuchungsausschuss, *Beschlussempfehlung und Bericht*, 17th Parl, BT-Drucksache 17/14600 (22 August 2013) [BT-Drucksache 17/14600].

of delivering *Ostauflklärung* (espionage against the Eastern bloc).⁵¹ The BND was established in 1955 (by a secret cabinet decision) and took over the Gehlen Organisation. Until 1990, the tasks, rights and powers of the BND were only “laid down in the form of service instructions⁵²”.⁵³ In 1990, the Bundestag adopted the *Federal Intelligence Service Act*, which has since then been reformed several times. The BND is mostly considered as a higher federal authority, for which the division of the Federal Chancellery is responsible.

According to § 1 II 1 of the *BND Act*, the BND “shall collect and analyse information required for obtaining foreign intelligence, which is of importance for the foreign and security policy of the Federal Republic of Germany.” Although the BND is thus to be considered a foreign intelligence service, in certain instances it can also be active in collecting and analysing internal security data.⁵⁴ It is furthermore the responsible agency in Germany in the field of organised crimes (for intelligence, not law enforcement); however, its main focus is now on international terrorism.⁵⁵ After the formal enactment of the *BND Act*, the rights of the BND were increased massively in 2002 through the “*Terrorismusbekämpfungsgesetz*” (“*Law against Terrorism*”), enacted inter alia as a response to the attacks on the Twin Towers in 2001. It is, however, not only the pure existence of the rights and powers of the BND that worry many commentators. They consider it especially problematic that the “law is written so broadly that it offers very little concrete guidance regarding the legal limits of surveillance programs.”⁵⁶ In recent times, the BND has come under public criticism several times, not only for scandals concerning the Iraq war (which triggered the establishment of a committee of inquiry)⁵⁷, but also for its high amount of data exchanges with the NSA⁵⁸ that I will describe in more detail below.

In 2016, despite the scandals, and against major opposition from the parliamentary groups Die Linke (Left Party) and Bündnis 90/Die Grünen (Green Party) as well as civil rights advocates, etc., the Bundestag adopted a new law on the BND⁵⁹ with increased powers (“Gesetz zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes”). *Netzpolitik.org* concluded that the effect of the law is that “everything that had been exposed as illegal by Snowden

⁵¹ Hansalek, *supra* note 14 at 16; However, spying went well beyond Ostauflklärung: “According to the German journal DER SPIEGEL (15/2017), which refers to secret files of the Federal Government and the BND, the German chancellor Konrad Adenauer, in 1960, ordered the BND under its head Gehlen to spy upon the SPD party executive and some of the leading Social Democrats, not the least the later chancellor Willy Brandt.” (Translation mine).

⁵² No formal legal norms without any external effects.

⁵³ *Ibid* at 19. “Dienstsanweisungen.”

⁵⁴ “Tätigkeiten vom Staatsgebiet der Bundesrepublik oder eine Zusammenarbeit mit Personen im Inland können eine Zuständigkeit des BND im Innern begründen.” (Translation mine).

Droste, *supra* note 42 at 29.

⁵⁵ Singer, *supra* note 38 at 48 49.

⁵⁶ Stiftung Neue Verantwortung, New America Foundation & Open Technology Institute, “Law and Policy in Internet Surveillance Programs: United States, Great Britain and Germany” (September 2013) 25/13 at 10 [Stiftung Neue Verantwortung].

⁵⁷ E.g.: Katharina Schuler, “Irakkrieg: Wie weit ging die deutsche Hilfe?”, *Die Zeit* (18 December 2008), online: <www.zeit.de/online/2008/38/bnd-untersuchungsausschuss>.

⁵⁸ Stiftung Neue Verantwortung, *supra* note 56 at 13.

⁵⁹ Gesetz zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes, Federal Law Gazette I, 2016 at 3346.

and the Committee of Inquiry will now just be declared as legal”⁶⁰. The BND may now monitor foreigners from German territory who are communicating with people abroad. As Leutheusser-Schnarrenberger (a former Minister of Justice) recalled, the government justified the discrimination against foreigners by stating that the BND/the state was not bound by the *Basic Law* in this case (and therefore fundamental rights such as Art. 10 that would not be applied to this case). In her view, this reasoning was intolerable since particularly Art. 10 of the *Basic Law* was not a fundamental right that applied only to Germans but rather a right of everyone. The law does furthermore not know any exceptions for foreign journalists; the surveillance of journalists could thus also constitute a serious encroachment upon the fundamental right to a free press.⁶¹ The Act and the bypassing of the application of Art. 10 and thus the G10 Commission (see below) also contradicts a judgement of the Constitutional Court in 1999 that determined that, although “[t]he territorial scope of protection of telecommunications privacy is not restricted to the domestic territory [...], Article 10 of the *Basic Law* is also applicable if an act of telecommunication that takes place abroad is, due to the fact that it is screened and evaluated on the domestic territory, sufficiently linked with domestic action of the state.”⁶²

The reasons and thus the legal justifications for surveillance measures and therefore for the interference with fundamental rights are even broader now, notably “to detect early any possible dangers for the internal or external security of the Federal Republic of Germany and to be able to counter them [or] to preserve the Federal Republic of Germany’s ability to act”.⁶³ The law only makes some exceptions for, for example, EU citizens. It furthermore explicitly legitimises the transferral of metadata to the NSA (see § 15 of the Act) and drastically increases the overall amount of tapped data by legitimising its collection. As a safeguard, the Federal Chancellery must authorize any surveillance that is conducted from national territory, and also make sure that the responsibility is clearly assigned to the Ministry.

⁶⁰ Andre Meister, “Das neue BND-Gesetz: Alles, was der BND macht, wird einfach legalisiert. Und sogar noch ausgeweitet.”, *netzpolitik.org* (30 June 2016), online: <https://netzpolitik.org/2016/das-neue-bnd-gesetz-alles-was-der-bnd-macht-wird-einfach-legalisiert-und-sogar-noch-ausgeweitet/>.

⁶¹ Sabine Leutheusser-Schnarrenberger, “Stoppt das BND-Gesetz!”, *Handelsblatt* (21 October 2016), online: www.handelsblatt.com/politik/deutschland/ueberwachung-stoppt-das-bnd-gesetz/14716120.html.

⁶² *Telekommunikationsüberwachung I*, BVerfGE 100, 313 at headnote 2. English translation, online: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1999/07/rs19990714_1bvr222694en.html.

⁶³ “[...] frühzeitig Gefahren für die innere oder äußere Sicherheit der Bundesrepublik Deutschland erkennen und diesen begegnen zu können, [oder] die Handlungsfähigkeit der Bundesrepublik Deutschland zu wahren.” (Translation mine). § 6 I *Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*, *supra* note 59.

b) Military Counterintelligence Service (Militärischer Abschirmdienst, “MAD”)

The MAD is part of the Federal Armed Forces, “organizationally as well as functionally. [...] It was established in 1956 by an organisational Act of the Minister of Defence within the framework of his constitutional capacities as commander-in-chief.”⁶⁴ Therefore, he is responsible for the MAD. The MAD is responsible for the collection and analysis of information about extremism, terrorism, espionage and counterintelligence in the field of defence. Furthermore, the MAD “takes part in the deployments abroad” to monitor and analyse information about the security of the German Federal Armed Forces abroad⁶⁵ (“assessment of security situations”⁶⁶). It is, however, not responsible for military reconnaissance since this is one of the BND’s task fields.⁶⁷

A formal Act (*MAD Act*) was only enacted in 1990. After the census judgement of the Constitutional Court in 1983 determining that each interference with the right to informational self-determination needed a legal basis in formal law and after a scandal involving illegal activities by the MAD in the 1970s, it had become apparent that a formal Act was necessary.⁶⁸ The rights of the MAD were expanded significantly by the *Law Against Terrorism* in 2002. The MAD has a special obligation to report to the German Parliamentary Control Panel (see § 14 VII *MAD Act*). Before it starts a strategic mission abroad it has to inform the Panel.

c) Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, “BfV”)

The BfV was established in 1950 by the *Act regulating the “Cooperation between the Federation and the Federal States in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution”* (“*BVerfSch Act*”). The BfV is subject to the Ministry of the Interior (§ 2 I 2 *BVerfSch Act*). The BfV is responsible for the collection and analysis of internal security data that point to a danger or threat to the free and democratic order, the security and thus to the existence of the state itself (see § 3 *BVerfSchG*). The BfV may also be active abroad.⁶⁹ It is also responsible for “intelligence activities carried out on behalf of a foreign power (counter-intelligence)” as well as “contribut[ing] to counter-sabotage and personnel/physical security.”⁷⁰ Its rights were also increased by the *Law against Terrorism* in 2002. “The BfV is now also requested to gather and analyse information

⁶⁴ “[...] ist ein organisatorischer und funktionaler Bestandteil der Bundeswehr und wurde im Jahr 1956 durch einen Organisationsakt des Bundesministeriums der Verteidigung im Rahmen der verfassungsrechtlichen Befehls- und Kommandogewalt [...] eingerichtet.” (Translation mine). Hansalek, *supra* note 14 at 26.

⁶⁵ Germany, Military Counterintelligence Service, online: MAD <www.kommando.streitkraeftebasis.de/portal/a/kdoskb/start/weitdstst/mad/ueberuns/>.

⁶⁶ Singer, *supra* note 38 at 45.

⁶⁷ *Ibid.*

⁶⁸ Thomas Siems, “Aufgaben eines militärischen Nachrichtendienstes” (2012) DÖV 425 at 426, 427.

⁶⁹ Droste, *supra* note 42 at 29.

⁷⁰ Germany, Bundesamt für Verfassungsschutz, Tasks, online: Bundesverfassungsschutz <<https://www.verfassungsschutz.de/en/about-the-bfv/tasks/what-exactly-are-the-tasks-of-the-domestic-intelligence-services/>>.

on efforts directed against the idea of international understanding, in particular the peaceful co-existence of peoples.”⁷¹ Furthermore, the BfV is now allowed to request information from telecommunication and financial as well as aviation companies.

d) GETZ, GTAZ, GIZ

The Joint Centre for Countering Extremism and Terrorism (*Gemeinsames Extremismus- und Terrorismusabwehrzentrum*, “GETZ”), the Joint Counter-Terrorism Centre (*Gemeinsames Terrorismusabwehrzentrum*, “GTAZ”) and the Joint Internet Centre (*Gemeinsames Internetzentrum*, “GIZ”) were all established in the years 2004-2012 to ensure better and simplified ways of coordination and co-operation of the German intelligence agencies.

The GETZ was established in 2012 “for countering right-wing extremism/terrorism, left-wing extremism/terrorism, extremism/terrorism of foreigners and espionage/proliferation”⁷², after the major scandal of the NSU terror group had disclosed significant mistakes of the (federal states’) security agencies.⁷³ The GTAZ was established in 2004 as a response to fundamentalist Islamist terror attacks. It is “not an autonomous authority but a joint co-operation and communication platform used by 40 internal security agencies.”⁷⁴ The GIZ was established in 2007; it involves the three major intelligence agencies in Germany, as well as the Office of the Federal Public Prosecutor General and the Federal Criminal Police Office. Its main task is the surveillance of websites with extremist Islamist content.⁷⁵

These cooperation centres are special in the German security architecture in that the different intelligence services (on federal and federal state level) are cooperating and coordinating work with the German police force despite the principle of separation in those special areas of security threats. All kinds of departments have been part of this cooperation so far. The Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) as well as the Central Office of the German Customs Investigation Service (*Generalzolldirektion*) have, for example, already been part of the cooperation system within the GETZ.⁷⁶ The aim of the Centres is to gather expertise and knowledge and to increase and improve the information sharing process of the different authorities. None of the three joint Centres is based on legislation specific to them but rather “[t]he cooperation between the authorities

⁷¹ “Nunmehr gehört es auch zu den Aufgaben des BfV, Informationen über Bestrebungen zu sammeln und auszuwerten, die gegen den Gedanken der Völkerverständigung [...] und insbesondere gegen das friedliche Zusammenleben der Völker [...] gerichtet sind.” (Translation mine). Hansalek, *supra* note 14 at 25.

⁷² Germany, Bundesamt für Verfassungsschutz, About the GETZ, online: Bundesverfassungsschutz <<https://www.verfassungsschutz.de/en/about-the-bfv/getz-en>>.

⁷³ Michael Kutscher, “Die Antinomie des Verfassungsschutzes” (2013) NVwZ 324 at 325.

⁷⁴ Germany, Bundesamt für Verfassungsschutz, About the GTAZ, online: Bundesverfassungsschutz <<https://www.verfassungsschutz.de/en/fields-of-work/islamism-and-islamist-terrorism/gtaz-en>>.

⁷⁵ Germany, Bundesamt für Verfassungsschutz, online: Bundesverfassungsschutz <<https://www.verfassungsschutz.de/en>>.

⁷⁶ Germany, Bundesamt für Verfassungsschutz, About the GETZ, online: Bundesverfassungsschutz <<https://www.verfassungsschutz.de/en/about-the-bfv/getz-en>>.

involved is based on the rules applicable to the individual authorities governing the issuing and the request for information (rules of transmission/ transfer).⁷⁷ Formal acts have so far supposedly not been considered necessary because “the organisational separation of the actors and the existing rules regarding the transfer of information should be maintained and no binding decisions be taken by the Centres themselves.”⁷⁸ Thus, to give just an example, according to the BfV website, the GTAZ, “did not require a new legal basis, because no agency was given additional competences or had to share sovereignty.”⁷⁹ Such a view is, however, highly disputable and has been the subject of many constitutional debates.⁸⁰ Its detailed description would, however, unfortunately go beyond the scope of this thesis. Other cooperation initiatives include the Intelligence Information and Analysis Unit for Right-Wing Extremism/Terrorism (*Nachrichtendienstliche Informations- und Analysestelle für Rechtsextremismus/-terrorismus*, “NIAS-R”), and the Police Information and Analysis Unit for Right-Wing Extremism/Terrorism (*Polizeiliche Informations- und Analysestelle für Rechtsextremismus/-terrorismus*, “PIAS-R”).⁸¹

Furthermore, in 2006, as a reaction to the World Trade Centre terror attacks, the Parliament adopted a law on the establishment of shared data of the police and the intelligence agencies (*Antiterrordateigesetz*, “ATD Act”) to “intensify and expedite the information sharing in the domain of international counterterrorism”.⁸² The Constitutional Court had to rule on the legitimacy of this law. It did, however, surprise by not addressing the problem of the possible interference with the *principle of separation*. Instead, in 2013, it ruled on an “informational principle of separation”⁸³ by deciding:

“From the fundamental right to informational self-determination follows a principle of separation of information (*informationelles Trennungsprinzip*). Under this principle, data may generally not be exchanged between the intelligence services and the police. [...] Transfers of data between the intelligence services and the police for use in potential operational actions must therefore normally serve a particularly important public

⁷⁷ “Die Zusammenarbeit der beteiligten Behörden stützt sich auf die für die einzelnen Behörden jeweils geltenden Vorschriften, die die Erteilung von und das Ersuchen um Auskünfte regeln (Übermittlungsvorschriften).” (Translation mine). Germany, Ministry of Justice/ Ministry of Internal Affairs. *Bericht der Regierungskommission zur Überprüfung der Sicherheitsgesetzgebung in Deutschland*, by Mathias Bäcker, et al (28 August 2013) at 168, online: <https://publikationen.uni-tuebingen.de/xmlui/bitstream/handle/10900/63016/regierungskommission-sicherheitsgesetzgebung.pdf?sequence=1&isAllowed=y>, cited in Matthias Dombert & Kaya Räuher, “Am Beispiel der deutschen Sicherheitsarchitektur: Zum Grundrechtsschutz durch Organisation” (2014) DÖV 414 at 415.

⁷⁸ *Ibid* at 415.

⁷⁹ Germany, Bundesamt für Verfassungsschutz, About the GTAZ, online: Bundesverfassungsschutz <https://www.verfassungsschutz.de/en/fields-of-work/islamism-and-islamist-terrorism/gta-z-en>.

⁸⁰ No case has yet been brought before the Constitutional Court by any political party (that would be authorised to do so in the court proceedings between governmental bodies—*Organstreitverfahren*).

⁸¹ Germany, Bundesamt für Verfassungsschutz, About the BfV, online: Bundesverfassungsschutz <https://www.verfassungsschutz.de/en/about-the-bfv/getz-en>.

⁸² Clemens Arzt, “Antiterrordatei verfassungsgemäß – Trennungsgebot tot?” (2013) NVwZ 1328 at 1329.

⁸³ *Ibid*.

interest which justifies the access to information under the laxer requirements that apply to the intelligence services.”⁸⁴

The National Cyberdefence Centre (*Nationales Cyber-Abwehrzentrum*, “NCAZ”) was established in 2011 to improve the cooperation between different federal authorities including the German intelligence agencies to deal with increasing cybercrimes. Its aims are “quick and uncomplicated ways of information sharing about security gaps in hardware and software, abstract forms of attacks and images of perpetrators as well as other risks and threats for the information and communication technology or the integrity and confidentiality of data.”⁸⁵ Typical for a purely informational coordination program, the NCAZ does not have any competences or rights of its own and is not considered a separate authority. Germany thus has three major intelligence services on the Federal level, which were given more and more powers since the terror attacks in 2001. Several joint cooperation centres have emerged and raise issues with respect to the principle of separation.

3. Control Mechanisms

In general, the function of a control mechanism can have two different starting points: firstly, the control can take the function of reviewing or verifying certain activities when those activities of legal relevance are already completed (review/“*Nachprüfung*”). Secondly, the executed control may also accompany the activities; thus, the control is being executed simultaneously with the activity. It may then have influence on the activity and its outcome (oversight/“*Überwachung*”); therefore, it may either be simply accompanying or alternatively trend-setting. Hansalek also mentions a factor beyond temporality and the form of control that needs to be considered as part of the control: the controlling body must have the capability to impose sanctions on the controlled actor. In his view, control is “working in a relationship of superiority and subordination with regards to the display of power”⁸⁶, and the possibility of imposing sanctions is a required element of such an assertion of this power. Additionally, a control body or mechanism might concentrate on evaluating the efficiency and/or the lawfulness of certain activities.⁸⁷

In Germany, the intelligence services are under the shared control of the Executive itself, the Parliament as well as the Judiciary. In the following, I will give a very short and broad overview of the different control mechanisms that are in place in Germany. It will, unfortunately, not be possible to go into detail, but in order to understand the role

⁸⁴ *Antiterrordatei*, BVerfGE 133, 277 at 123, English version online:

Bundesverfassungsgericht <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/04/rs20130424_1bvr121507en.html> [*Antiterrordatei*].

⁸⁵ “Erklärtes Ziel der Zusammenarbeit im NCAZ ist der zügige und unkomplizierte Informationsaustausch über Sicherheitslücken in Hard- und Software, abstrakte Angriffsformen und Täterbilder sowie sonstige Risiken und Gefahren für die IKT oder die Integrität und Vertraulichkeit von Daten.” (Translation mine). Tobias Linke, “Rechtsfragen der Einrichtung und des Betriebs eines Nationalen Cyber-Abwehrzentrums als informelle institutionalisierte Sicherheitskooperation” (2015) 4 DÖV 128 at 129.

⁸⁶ “Das Wirken in einem Über- und Unterordnungsverhältnis zur Entfaltung von Macht.” (Translation mine). Hansalek, *supra* note 14.

⁸⁷ Singer, *supra* note 38 at 35.

of parliamentary control in the German system of checks and balances, one should understand the basic framework of which it is a part.

a) Different Mechanisms of Executive Control

*Legal, Administrative and Subject-specific Supervision*⁸⁸

According to Singer, “the major part of the control activity is being performed by the Executive”⁸⁹, not only through the different kinds of supervision by the respective responsible federal authorities (the Ministries, the Federal Chancellery), but also by the Federal Audit Office (*Bundesrechnungshof*) and the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte(r) für den Datenschutz und die Informationsfreiheit*) (see below).⁹⁰ In general, the intelligence services are under administrative and subject-specific supervision by their higher-ranking authorities, just like every other authority in Germany. In the case of the intelligence services, the higher-ranking authority is the respective minister who has the so-called “Ressortkompetenz” over the respective service.

Art 65 of the *Basic Law* reads as follows:

“The Federal Chancellor shall determine and be responsible for the general guidelines of policy [Richtlinienkompetenz]. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility [Ressortkompetenz] [...]”⁹¹

The effectiveness is, however, limited since the executive control is indeed very general. Specific cases and questions are only part of the control if “according to the assessment of the secret agencies these [individual issues] have [...] political impact. Therefore, the control depends on the respective ‘willingness’ of the services to ‘present such issues’.”⁹² Furthermore, even the former President of the BND especially criticized the fact that the Federal Chancellery was responsible for the BND, since “[t]he administrative and technical supervision in the Federal Chancellery (Division 6) consists mainly of displaced or seconded members of the Federal Intelligence Service.”⁹³ This may indeed seem problematic in terms of a possible conflict of interest.

⁸⁸ Dienst- und Fachaufsicht/Rechtsaufsicht.

⁸⁹ “Der weit überwiegende Teil der Kontrolltätigkeit wird jedoch durch die Exekutive geleistet.” (Translation mine). Singer, *supra* note 38 at 10.

⁹⁰ *Ibid.*

⁹¹ Art. 65 GG; English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

⁹² “Problematischerweise sind allerdings Einzelfragen, soweit sie nach eigener Einschätzung der geheimen Dienste keine politischen Auswirkungen haben, hiervon nicht erfasst. Mithin hängt die Kontrolle von der jeweiligen ‘Vorlagewilligkeit’ der Dienste ab.” (Translation mine). Niclas-Frederic Weisser, “Der Richtervorbehalt im Nachrichtendienstrecht” (2014) 19 DÖV 831.

⁹³ “[...] die Dienst- und Fachaufsicht im Bundeskanzleramt (Abteilung 6) überwiegend aus versetzten oder abgeordneten Angehörigen des Bundesnachrichtendienstes bestünde.” (Translation mine). Reiko Pinkert & Ronen Steinke, “Früherer BND-Chef kritisiert Kontrollsystem des deutschen Geheimdiensts”, *Süddeutsche Zeitung* (22 September 2016), online: <www.sueddeutsche.de/politik/bundesnachrichtendienst-angriff-auf-die-lauscher-1.3174459>.

Federal Audit Office (Bundesrechnungshof)

The Federal Audit Office is responsible for the control of the budget management of the intelligence services, thus the control of the annual accounts of the intelligence services. The Federal Audit Office reports to the Parliamentary Control Panel, the Parliamentary Trust Body, the Federal Chancellery and the Ministry of Finance. The Federal Audit Office is not subject to a control by any other authority of the Executive.

Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte(r) für den Datenschutz und die Informationsfreiheit)

The Federal Commissioner for Data Protection and Freedom of Information is responsible for the assurance that the state authorities are working in line with legislative provisions on data protection. The Commissioner is elected by the Bundestag on a proposal of the government. Until 2016, he/she was organisationally considered to be part of the Ministry of Internal Affairs and was therefore also subject of Executive control. Now, he/she is an independent supreme Federal Authority. The European Court of Justice (“ECJ”) had decided in 2010 that the independence of the Data Commissioner could not be safeguarded if the position was being subjected to control by higher Executive authorities.⁹⁴ The Commissioner is now solely subject to parliamentary control by the Bundestag.⁹⁵ The Commissioner has repeatedly spoken out against data infringements and illegal activities of the intelligence agencies, most recently in 2016, when she (current Commissioner Andrea Voßhoff) complained that the “BND collected and systematically continued to use personal data without a legal basis”.⁹⁶ Thereby, she referred to the practice of using so-called “lists of selectors”, a topic that I will come back to below. Another example of the Commissioner’s role of not only taking care of the necessary data protection but also of rousing public awareness of the general topic of national security was her annual report in 2015, in which she expressed her serious concerns about the intelligence services:

“I would also like to emphasise once again that the system of ‘checks and balances’ in the area of the intelligence services has run into massive difficulties. In particular since 2001, the tasks and powers of the security authorities as well as their personnel and material resources have been considerably expanded, cross-border cooperation between police forces and intelligence services have been intensified nationally and internationally, centralized large databases have been set up, and a new security structure has been created. ... There has been no corresponding development within the control bodies, which means that there are also serious legislative deficits which must be removed as quickly as possible in the interest of the citizens.”⁹⁷

⁹⁴ *European Commission v Germany*, C-518/07 [2010] ECR-I 1885 (09 March 2010) [*European Commission v. Germany*].

⁹⁵ Beauftragter für die Nachrichtendienste, online: <https://www.bfdi.bund.de/DE/Home/home_node.html>.

⁹⁶ Antonius Kempmann, Reiko Pinkert & Jan Lukas Strozyk, “‘Systematische Gesetzesverstöße’ des BND”, *Tagesschau.de* (09 September 2016), online: <<https://www.tagesschau.de/inland/bnd-315.html>>.

⁹⁷ “Ich möchte aber auch an dieser Stelle noch einmal betonen, dass das System der „Checks and Balances“ im Bereich der Nachrichtendienste in eine massive Schieflage geraten ist. So sind, insbesondere seit dem Jahr 2001, die Aufgaben und Befugnisse der Sicherheitsbehörden sowie deren Personal- und Sachmittel erheblich ausgebaut, die verbundübergreifende Zusammenarbeit von Polizeien und Nachrichtendiensten national und international intensiviert, zentrale Großdatenbanken errichtet und eine neue Sicherheitsstruktur geschaffen worden [...]. Auf Seiten der Kontrollorgane ist keine entsprechende Entwicklung erfolgt, d. h. auch insoweit bestehen gravierende gesetzgeberische Defizite, die im Interesse der Bürgerinnen und Bürger schnellstmöglich beseitigt werden müssen.“ (Translation mine). Anna Biselli, “Bundesdatenschutzbeauftragte fordert in Tätigkeitsbericht bessere Geheimdienstkontrolle und mehr Einfluss”, *netzpolitik.org* (17 June 2015), online: <<https://netzpolitik.org/2015/bundesdatenschutzbeauftragte-fordert-in-taetigkeitsbericht-bessere-geheimdienstkontrolle-und-mehr-einfluss/>>.

In the leaked report of the Data Commissioner about the activities of the BND, she furthermore in particular emphasised that the BND had, contrary to law, heavily constrained control (for example, the control exercised by the Data Commissioner herself) and had been engaged in several severe illegalities and infringements of fundamental rights.⁹⁸

The Commissioner for the Federal Intelligence Services (Beauftragter für die Nachrichtendienste)

The Commissioner for the Federal Intelligence Services takes the role of a so-called “coordinator” of the different intelligence agencies in Germany. The position was established in 1975, as a response to the *Guillaume*-scandal⁹⁹ and the non-efficient collaboration of the intelligence agencies. The Commissioner is chosen by the Chancellor and works in the Federal Chancellery as a Secretary of State. Currently, the Commissioner is the Vice-head of the Federal Chancellery. The Commissioner is not only responsible for an effective coordination and cooperation of the three Federal agencies; he is also required to support the Parliamentary Control Panel.¹⁰⁰ He, furthermore, has “rights of information against the ministries and the intelligence services, the right to make proposals for cooperation, the right to participate in legislative acts concerning the intelligence services, the right to attend discussions at the executive level of the intelligence services, rights of information against the Ministry of the Interior and the Ministry of Defence.”¹⁰¹ According to Hirsch, the Commissioner should not be regarded as a separate control body though, since he does not have any particular control power other than respective authorities that exercise the administrative and subject-specific supervision of the agencies.¹⁰²

b) Parliamentary Control Mechanisms

Parliamentary Claims to Information

Art. 38 I 2 in conjunction with Art. 20 II 2 of the *Basic Law* confers upon the Parliamentarians the right to ask questions and an entitlement to information. The MPs are often not informed fully about the government’s activities to be able to legislate and control the Executive. Therefore, the Constitution confers upon them not only the right to ask the Executive questions but also stipulates the latter’s obligation to answer them. The Rules of Procedure of the German Bundestag regulate the rights and different kinds of possible questions more closely; it can, however, not limit the

⁹⁸ Andre Meister, “Secret Report: German Federal Intelligence Service BND Violates Laws And Constitution By The Dozen”, *netzpolitik.org* (2 September 2016), online: <<https://netzpolitik.org/2016/secret-report-german-federal-intelligence-service-bnd-violates-laws-by-the-dozen/>>.

⁹⁹ Hansalek, *supra* note 14 at 13; explanatory note: Guillaume was an intelligence agent for East Germany’s secret service who had become West German chancellor Willy Brandt’s secretary. The Guillaume affair caused Brandt’s political downfall.

¹⁰⁰ Germany, Bundesregierung, Chef des Bundeskanzleramts, online: Bundeskanzleramt <<https://www.bundesregierung.de/Content/DE/StatistischeSeiten/Breg/element-chef-des-bundeskanzleramtes.html>>.

¹⁰¹ Germany, Wissenschaftlicher Dienst des Deutschen Bundestags, “Bundesbeauftragte und Beauftragte der Bundesregierung” by Steffi Menzenbach; Jan Kersten & Arne Thomas (Berlin: Deutscher Bundestag, 2008) at 15, online: <www.bundestag.de/blob/494258/ceda55b2693bdf42850ad8f9bfc9a4a/bundesbeauftragte-data.pdf>.

¹⁰² Alexander Hirsch, *Die Kontrolle der Nachrichtendienste- Vergleichende Bestandsaufnahme, Praxis und Reform* (Berlin: Duncker & Humblot, 1996) at 131.

rights of the MPs or increase the government's obligations in a legally binding way since it would then interfere with the constitutionally conferred rights and obligations.

There are, also, certain limits to the MPs' entitlement to information. These limitations were developed in several decisions by the Constitutional Court. The government must not, inter alia, disclose information that would interfere with someone's fundamental rights or information that needs to stay confidential. However, "the refusal to answer a question at all should remain an exception."¹⁰³ At the moment, the Constitutional Court is dealing with the scope of the parliamentarians' right to ask questions and get them answered sufficiently. Bündnis90/Die Grünen claimed that the government was withholding important information and thus, was denying them their rights as parliamentarians.¹⁰⁴

The questions of the MPs do have to fall into the scope of the government's area of competence; the government does not have to answer questions that belong to the area of competence of another constitutional body, its core area of executive autonomy or that refer to private issues of individual members of the government. There are different kinds of questions that may be asked with different kinds of requirements (for example the number of parliamentarians asking etc.).¹⁰⁵ Due to its limited space, this paper won't go into detail on this point.

Another right of the Bundestag (and even its parliamentary groups) that might be mentioned in connection with the right of questioning, since it simplifies the latter's effectiveness, is the so-called "right to require presence" (Art 43 I of the *Basic Law*). The Bundestag and its committees can "demand the presence of any member of the government"¹⁰⁶, although they can actually only bring down the Chancellor ("constructive vote of no confidence", Art. 67 of the *Basic Law*) and not the ministers (although they lose their positions as well if the Chancellor is brought down).¹⁰⁷ The Parliament can thus publicly question the government and criticise it for actions of the Executive ("parliamentary responsibility"¹⁰⁸). Since the members of the government know about these possibilities, one might argue that the right to require presence has even some kind of pre-effect, possibly influencing the decisions of the government's

¹⁰³ Jürgen Lennartz & Günther Kiefer, "Parlamentarische Anfragen im Spannungsfeld von Regierungskontrolle und Geheimhaltungsinteressen" (2006) DÖV 185 at 186, referring to VerfGH NRW, OVGE NRW 43, 274 (275), SaarVerfGH, LVerfGE 13, 303 (308).

¹⁰⁴ The case is, however, not dealing with intelligence services. The case is furthermore about the so-called "Kleine Anfragen" ('minor interpellations') that may be asked by 5 % of the members of the Bundestag or a single parliamentary group and are answered in written form. "Große Anfragen" ('major interpellations') are debated in the Bundestag.

¹⁰⁵ A short summary of the different kind of questions can be found online:

https://www.bundestag.de/en/parliament/function/scrutiny/instruments_scrutiny/245710.

¹⁰⁶ Berger, *supra* note 15 at 51.

¹⁰⁷ Hans Klein, "Zitier- und Fragerecht des Bundestages, Mehrheitsrecht", Artikel 43 in Theodor Maunz & Günter Dürig, *Grundgesetz-Kommentar*, 78th edition, (Beck Online, March 2014) at paras 37,38.

¹⁰⁸ *Ibid.*

members. Furthermore, the right “expresses the far-reaching claim of the Bundestag on participation in the political decision-making process of the federal level.”¹⁰⁹

The Defence Committee, the Committee on Internal Affairs, the Budget Committee of the Bundestag
(Verteidigungsausschuss, Innenausschuss, Haushaltsausschuss des Bundestages)

The Bundestag establishes different committees in each legislative period. The Defence Committee is in fact a so-called compulsory committee (Art. 45a of the *Basic Law*). The Committee on Internal Affairs is not compulsory, but has so far been established in every legislative period. With regards to the security services, the Defence Committee focuses on the work of the MAD, whereas the Committee on Internal Affairs concentrates on the BfV. The Parliamentary Trust Body of the Budget Committee controls the overall budget of all three major federal intelligence services (see below).

The Committees normally hold closed sessions (§ 69 of the Rules of Procedure of the Bundestag). They may, however, decide on making certain parts of their meetings public. Due to the big size of the Committees (the Defence Committee has 32 members at the moment¹¹⁰, the Committee on Internal Affairs 37¹¹¹), their control function is quite limited. The Executive is mostly very reluctant to hand out confidential information to committees of that size. Therefore, the Committees mostly rely on reports and briefings presented by the Executive.¹¹² It is also problematic that there is no Committee that is truly responsible for the BND in that no mandatory committee has that role. Furthermore, each Committee is informed about one agency only¹¹³, thereby losing sight of the larger context.

Committee on Petitions (Petitionsausschuss)

The Committee on Petitions of the Bundestag is mandated in Art. 17 of the *Basic Law*: “Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.”¹¹⁴ The Committee on Petitions then (monthly) issues a “recommendation for a decision” to the Bundestag concerning the petitions.¹¹⁵ In the last years, the Committee on Petitions has dealt with different kinds of petitions concerning the intelligence agencies.¹¹⁶ The citizens may therefore “force” the Bundestag to deal with certain issues and therefore exercise some kind of control. In 2015, for example, someone submitted a petition to the Committee that—inter alia—the budget of the BND should be decreased to the amount it had in 2012, explaining that “the [BND]

¹⁰⁹ “Ausdruck des weit ausgreifenden Anspruchs des Bundestages auf Teilhabe am politischen Entscheidungsprozess auf Bundesebene.” (Translation mine). *Ibid* at 36.

¹¹⁰ Germany, Bundestag, Verteidigungsausschuss, online: Verteidigungsausschuss <<https://www.bundestag.de/verteidigung>>.

¹¹¹ Germany, Bundestag, Innenausschuss, online: Innenausschuss <<https://www.bundestag.de/inneres>>.

¹¹² Hirsch, *supra* note 102 at 135.

¹¹³ *Ibid*.

¹¹⁴ Art. 17 GG, English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹¹⁵ See § 112 of the Rules of Procedure of the Bundestag.

¹¹⁶ E.g. Pet 1-18-06-299-014395.

had proved to be an authority which could not be controlled by parliamentary bodies.”¹¹⁷ The Committee of Petitions referred in its recommendation for a decision to—inter alia—the important role and work of the Parliamentary Control Panel, the constitutional provision that ensured its existence as well as the coalition agreement of the governing parties to support and increase the parliamentary control of the intelligence services. It therefore recommended to terminate this petition.¹¹⁸ Nevertheless, the power of the Committee of Petitions regarding parliamentary control is rather limited, not least due to the fact that the government parties outvoted the Committee as well as the Bundestag.

Committee of Inquiry (Untersuchungsausschuss)

According to Art. 44 of the *Basic Law*, the “Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry, which shall take the requisite evidence at public hearings. The public may be excluded.”¹¹⁹ The right of the Parliament to establish a committee of inquiry is therefore a minority right. It is, however, not possible to establish a committee of inquiry in the field of defence. Instead, the Committee of Defence has to conduct an inquiry (on request of one-fourth of its members) and will then have the same powers as a committee of inquiry would have.¹²⁰

A committee of inquiry is “no longer dependent on foreign information alone, but has a right to self-information, i.e. it may gather its own information by way of proof-gathering.”¹²¹ A committee of inquiry may, for example, question witnesses¹²² and employees and civil servants of the Executive, which is obliged to give permission to these witnesses¹²³. The rules of criminal procedure shall apply with the necessary modifications to the taking of evidence. The Executive often refers to the core area of executive autonomy to circumvent certain testimonies.¹²⁴ The committee may furthermore for example request all documents and files of the authorities concerning the inquiry matter.¹²⁵ All the rights are, however, “subject to the constitutional limitations”¹²⁶, for example, the “constitutional requirement of

¹¹⁷ “[...]habe sich als Behörde erwiesen, die sich nicht durch parlamentarische Gremien kontrollieren lasse.” (Translation mine). Germany, Deutscher Bundestag, Petitionsausschuss, Pet 2-18-02-1101-018901 (17 December 2015).

¹¹⁸ *Ibid.*

¹¹⁹ Art. 44 GG, English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹²⁰ Art. 45 a II GG.

¹²¹ “[...] nicht (mehr) alle in auf Fremdinformation durch die Regierung angewiesen, sondern hat ein Recht auf Selbstinformation, d.h. auf eigene Informationsbeschaffung im Wege der Beweiserhebung.” (Translation mine). Lars Brocker, “§ 31 Untersuchungsausschüsse” in Martin Morlok; Utz Schliesky & Dieter Wiefelspütz, eds, *Parlamentsrecht. Praxisbandbuch* (Baden-Baden: Nomos 2016) at 960.

¹²² See §§ 20-27 *Gesetz zur Regelung des Rechts der Untersuchungsausschüsse des Deutschen Bundestages* (*Untersuchungsausschussgesetz*), Federal Law Gazette I, 2001 at 1142, as last amended by Article 4 I of the Act of 5 Mai 2014, Federal Law Gazette I, 2004 at 718 [PUAG].

¹²³ See § 23 PUAG.

¹²⁴ Hirsch, *supra* note 102 at 139.

¹²⁵ See § 18 PUAG.

¹²⁶ *Untersuchungsausschuss Geheimgefängnisse*, BVerfGE 124, 78 [Untersuchungsausschuss Geheimgefängnisse].

the public interest in an investigation, [...], (the) core area of executive autonomy, [and] (the) protection of fundamental rights.”¹²⁷

Furthermore, the Constitutional Court decided that the so-called “Chairmen-Procedure” was legitimate. If the government refuses to disclose certain information, the chairman and the vice-chairman of the Committee may request to see the information to decide whether the rejection was based on sufficient grounds.¹²⁸ In the words of Gusy, parliamentary “commissions of inquiry have a dual character”, as both being “organs for fact-findings” and “quasi-judicial powers.”¹²⁹ Hirsch takes the view that the Committee is often being used for partisan reasons, for example by the Opposition, to gain an advantage in the public perception, instead of being focussed on fact-finding and the truth.¹³⁰ So far, there have been thirteen Committees of Inquiries that have dealt with possible legal infringements by the intelligence agencies.¹³¹

In Germany, the Parliamentary Control Panel is not a Committee of Inquiry. It does not have any of the compulsory powers of the Committee. A permanent Committee of Inquiry (as in a body like the Control Panel but with committee of inquiry powers) in matters of national security is often considered as “constitutionally inadmissible”, in particular with regard to the principle of the separation of powers.¹³² Thus, Singer argues against such a committee because it “would not only accompany the activities of the government permanently but it could also force it to disclose each individual step of its opinion-forming and decision-making.”¹³³

Parliamentary Trust Body (Vertrauensgremium)

According to § 10a BHO, the Parliamentary Trust Body is a parliamentary panel that meets in secret and is responsible for the budget (plans) of the intelligence agencies. It is considered as a “parliamentary auxiliary body”¹³⁴ that tries to achieve a balance between the principle of publicity (also for the budget of the agencies) and the need for secrecy when it comes to intelligence agencies. It therefore acts “on behalf” of the Bundestag. Its members are elected among the members of the Budget Committee for one legislative period. According to § 10a (2) (2) BHO, the Parliamentary

¹²⁷ “[...] verfassungsrechtlichen Erfordernis des öffentlichen Interesses an einer Untersuchung, [...], Kernbereich der exekutiven Eigenverantwortung, [und] Grundrechtsschutz.” (Translation mine). Brocker, *supra* note 121 at 964-968.

¹²⁸ Paul J Glauben, “Der Schutz staatlicher und privater Geheimnisse im Spannungsfeld parlamentarischer Untersuchungen” (2007) 4 DÖV 149 at 154, referring to *Flick-Untersuchungsausschuss*, BVerfGE 67, 100 at 137 [*Flick-Untersuchungsausschuss*].

¹²⁹ Gusy, “Sicherheitsbehörden”, *supra* note 48 at 230.

¹³⁰ Hirsch, *supra* note 102 at 140.

¹³¹ Singer, *supra* note 38 at 56.

¹³² Dietmar Peitsch & Christina Polzin, “Die parlamentarische Kontrolle der Nachrichtendienste” (2000) 4 NVwZ 387 at 390.

¹³³ “[...] nicht nur die Tätigkeit der Bundesregierung stetig begleiten würde, sondern sie jederzeit zur Offenlegung der einzelnen Schritte ihrer Meinungs- und Willensbildung zwingen könnte.” (Translation mine).

Singer, *supra* note 38 at 99.

¹³⁴ *Ibid* at 150.

Trust Body has the same rights as the Parliamentary Control Panel in its area of responsibility. The cooperation between the Parliamentary Trust Body and the Parliamentary Control Panel will be considered in more depth below (Reform of Act on the PKGr in 1999).

The Art. 13 IV-Panel (Gremium nach Art. 13 VI GG)

Art. 13 of the *Basic Law* protects the inviolability of the home. Since every wiretapping or surveillance at a person's home constitutes an encroachment upon the fundamental right protected in Art. 13, there have been many constitutional complaints before the Constitutional Court concerning Art. 13. In 1998, the *Basic Law* was amended, making it possible that the Bundestag passes laws that allow acoustical surveillance by technical means not only for the purpose of general risk preventions but also for that of criminal prosecutions. Due to this highly controversial power that might lead to even more encroachments on fundamental rights, certain additional safeguards were necessary to make sure that this power was not expanded without reason. Therefore, paragraph six of Art 1 requires the government to inform the Bundestag about the use of technical measures in an annual report. This report shall then be the basis of the work of an Art. 13 IV panel that is elected by the Bundestag and that executes the parliamentary control of these "wire-tapping reports".¹³⁵ The panel consists of nine members.

c) Control sui generis

The G10 Commission (G 10-Kommission)

The G10 Commission is responsible for the approval of all encroachments upon Art. 10 of the *Basic Law* that protects the "privacy of correspondence, posts and telecommunications"¹³⁶. The G10 Commission was established by the "Law on the restriction of the privacy of correspondence, posts and telecommunications" (*Gesetz zur Beschränkung des Brief-, Post- und Fernmedegeheimnisses*, "G10 Act"), an Act that legitimates certain restrictions to that fundamental right under certain circumstances.

Here, it might be useful to give a short historical flashback: Art. 10 of the *Basic Law* protects "[t]he privacy of correspondence, posts and telecommunications."¹³⁷ Up until 1968, only the intelligence services of the US, France and Great Britain were allowed to "wiretap phones, control post and read along the telegram circulation" in Germany because of what victorious powers had laid down in Art. 5 (2) (1) of the General Treaty, because of their duty to protect "the security of the Armed Forces who are based in the Federal Republic".¹³⁸ The powers were being upheld as long as Germany did not provide for adequate protection for the allied Armed Forces. In 1968, the constitutional

¹³⁵ Hansalek, *supra* note 14 at 98.

¹³⁶ Art. 10 GG; English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹³⁷ Art. 10 I GG; English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹³⁸ Claus Arndt, "Parlamentarische Kontrolle der Nachrichtendienste", in Hans-Peter Schneider & Wolfgang Zeh, *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland: ein Handbuch* (Berlin: Walter de Gruyter, 1989) at 1378.

legislature therefore introduced the second paragraph of Art. 10 stating that the fundamental right may be restricted in order to “protect the free democratic basic order or the existence or security of the Federation or of a Federal State”¹³⁹. However, “restrictions may be ordered only pursuant to a law, [...] which] may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.”¹⁴⁰ The Parliament therefore introduced the *G10 Act*. The G10 Commission is now responsible for “every aspect of the BND’s intrusion upon constitutionally protected telecommunications privacy, including the collection, analysis, use and transfer (to German and non-German entities) of personally-identifying telecommunications data.”¹⁴¹ It also investigates individual claims of citizens that their fundamental right of Art. 10 was violated by the Executive. Additionally, it “not only authorizes surveillance programs, but also controls [...] how these programs are implemented regarding the collection, storage and analysis of personal data.”¹⁴²

A few brief remarks concerning the members of the G10 Commission are in order: the chair of that Commission has to have the legal qualifications of a judge. The members of the G10 Commission are appointed by the Parliamentary Control Panel. In total, there are four permanent members and four deputy members. Despite the members being appointed by the Control Panel, the G10 Commission is—according to the prevailing opinion—not part of the parliamentary control system but a control body *sui generis*.

Art. 10 II of the *Basic Law* does not specify whether the “agencies and auxiliary agencies” that are reviewing the cases are part of the legislature, part of the executive or part of the judiciary. In 1970, the Constitutional Court ruled its famous “*Abhörurteil*” (“Judgement on Wiretapping”), deciding that, contrary to its former judgements, there were exceptions in which there was no possibility of judicial review for interferences into fundamental rights by the executive. Instead, the review should be done “by independent institutions within the functional area of the Executive that were appointed or formed by Parliament.”¹⁴³ It seemed that the Constitutional Court did not see the G10 Commission as part of the judiciary, but on the contrary as an organ in the “functional area of the Executive.”¹⁴⁴

The G10 Commission partly also acts very similarly to an administrative court “if it decides upon decisions of a Minister, [upon] restrictive measures [...] or] ... the complaint of a citizen who believes that his fundamental right under

¹³⁹ Art. 10 II GG.

¹⁴⁰ *Ibid.*

¹⁴¹ Russell A. Miller, “Intelligence Oversight – Made in Germany” in Zachary K. Goldman & Samuel J. Rascoff, *Global Intelligence Oversight, Governing Security in the Twenty-First Century* (Oxford: Oxford University Press, 2016) at 265.

¹⁴² Stiftung Neue Verantwortung, *supra* note 56 at 13.

¹⁴³ “[...] sondern durch vom Parlament bestellte oder gebildete, unabhängige Institutionen innerhalb des Funktionsbereichs der Exekutive gewährt wird.” (Translation mine). *Abhörurteil*, BVerfGE 30, 1 at 105 [*Abhörurteil*].

¹⁴⁴ “Funktionsbereich der Exekutive” (Translation mine). *Ibid.*

Article 10 is infringed.” However, it cannot “give the parties concerned a legal hearing.”¹⁴⁵ Indeed, contrary to a court, it may go so far as to “abolish legally sound measures for reasons of expediency.”¹⁴⁶

As for the question of whether the Commission may be considered as part of the legislative and thus a parliamentary control body, one may take the systematic reading of the *Basic Law* and compare Art. 10 II to the article concerning the Parliamentary Commissioner for the Armed Forces (Art. 45b). He is literally described as an “assist[ant to] the Bundestag in exercising parliamentary oversight.”¹⁴⁷ One may therefore assume that the constitutional legislature would have used a similar wording as it did twelve years before if it had planned to constitutionally stipulate that the new authority should be considered as part of the parliamentary control architecture.¹⁴⁸ Arndt also refers to the legislative procedure of 1968 (see below), when, contrary to the last remarks, the parliamentarians were indeed in favour of a parliamentary review body.¹⁴⁹ However, it seems as if according to the final version of Art. 10 II it “[...] is not permitted by constitutional law to entrust an organ of parliament with the scrutiny of surveillance measures which as such would at any time be conceptually at the disposition of the majority of the parliament.”¹⁵⁰

The G10 Commission does furthermore have certain “privileges” that distinguish it from parliamentary control bodies such as the Parliamentary Control Panel and the Committees of Inquiries. It may “*originally* [my emphasis] decide on the permissibility of G10-procedures (s 15 V *G10-Act* in conjunction with Art. 10 II 2 of the *Basic Law*)”.¹⁵¹

Therefore, one might draw the conclusion in line with the prevailing view mentioned earlier that the G10 Commission should be considered as an organ *sui generis*: it does have certain features of each respective division of government but is also always subject to certain characteristics or limitations that are not typical of that division.

Independent Body (Unabhängiges Gremium)

The new independent body that was introduced in 2016 by the *Ausland-Ausland-Fernmeldeaufklärungsgesetz* will be described more closely below in the part on the Parliamentary Control Panel (Reform 2016).

¹⁴⁵ “[...] wenn sie über Entscheidungen eines Ministers befindet, [über] Beschränkungsmaßnahmen [...] oder] über die Beschwerde eines Bürgers, der sein Grundrecht aus Art. 10 verletzt glaubt [...] [Sie kann jedoch,] den Betroffenen kein rechtliches Gehör gewähren [...]“ (Translation mine). Arndt, *supra* note 135 at 1385.

¹⁴⁶ “[...] wenn sie über Entscheidungen eines Ministers befindet, [über] Beschränkungsmaßnahmen [...] oder] über die Beschwerde eines Bürgers, der sein Grundrecht aus Art. 10 verletzt glaubt [...] [Sie kann jedoch,] den Betroffenen kein rechtliches Gehör gewähren, [dafür aber anders als ein Gericht] rechtlich einwandfreie Maßnahmen aus Gründen der Zweckmäßigkeit aufheben.“ (Translation mine). *Ibid.*

¹⁴⁷ Art. 45b GG, English translation online: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0210>.

¹⁴⁸ Arndt, *supra* note 138 at 1383.

¹⁴⁹ *Ibid.*

¹⁵⁰ “[...] von Verfassung wegen nicht gestattet, ein Parlamentsorgan mit der Nachprüfung von Überwachungsmaßnahmen zu betrauen, das als solches begrifflich jederzeit zur Disposition der Parlamentsmehrheit stünde.“ (Translation mine). Walter Seuffert, “Wie wandellbar muß eine Verfassung sein?” *Frankfurter Allgemeine Zeitung*, 09. March 1971 at 10, referred to by Arndt, *supra* note 138 at 1383.

¹⁵¹ “Lediglich die G10-Kommission nimmt eine privilegierte Sonderstellung ein, da sie originär über die Zulässigkeit von G10-Maßnahmen entscheidet (§ 15 V G10 iVm Art. 10 II 2 GG).” (Translation mine – second half sentence). Warg, *supra* note 25 at 1265.

d) Control by the Media and Civil Society

The control of the intelligence agencies is not only being exercised by institutions of the state. The media and, thereby, the society also play a major role. Indeed, many scandals that involved the agencies have only come to light because of media reports. Even members of the Parliamentary Control Panel have often learned about certain activities of the agencies only because of media coverage. In addition to the leading newspapers and TV channels, also many new online media have started to report comprehensively on matters of national security and activities of the intelligence agencies. The website *netzpolitik.org* for example only concentrates on news regarding digital rights and transparency. In 2015, the head of the BfV even brought a charge of the dissemination of state secrets against two journalists of *netzpolitik.org* after the website had published some of the BfV's internal information. The criminal charges later lead to a highly controversial debate on the rights of the free press, the role of the Minister of Justice concerning the charges and his role in the scandal and, not the least, even to the dismissal of the Federal Attorney General.¹⁵²

However, the assessment of the role of the public and, due to their interdependence, also that of the media as 'control bodies' of the intelligence services and the evaluation of the effectiveness of the control mechanisms (not the least the parliamentary ones) greatly depend on the public view of the agencies in general. Since the agencies were for a long time not or, in the case of the BfV, only partly based on legislative statutes, Borgs-Maciejewski assumed that civil society was critical or suspicious of the agencies because of their activities "apparently" being executed in a "legal vacuum".¹⁵³ In 2006, he thus wrote that society was misjudging the intelligence agencies and that parliamentary control should focus on fostering society's trust in the agencies. Furthermore, he proclaimed that the German intelligence services were never, "not even remotely, associated with 'Rainbow Warrior', 'Guantanamo' or 'rendition into countries of torture'."¹⁵⁴ This was a claim that—in retrospect—almost appears absurd.

In 2016, Miller, in his chapter on parliamentary control in Germany (in fact only about the G10 Commission) in a book called "Global Intelligence Oversight", stated that the NSA scandal had only created a stir because "Snowden's spark hit the dry tinder of a persistent, widespread, but mostly low-grade Anti-Americanism in Germany".¹⁵⁵ He then referred to the "Germans' privacy fetish"¹⁵⁶ before harshly criticising the ("unconstitutional") G10 Commission and its effectiveness.¹⁵⁷ What becomes apparent by these short examples is in fact that the role of the public in the control

¹⁵² "Chronik der Netzpolitik-Affäre: Brisante Ermittlungen und ein Rauswurf", *Frankfurter Allgemeine Zeitung* (05 August 2015), online: <www.faz.net/aktuell/politik/inland/netzpolitik-affaere-chronik-der-geschehnisse-13735171.html>.

¹⁵³ Borgs-Maciejewski, *supra* note 34 at 42.

¹⁵⁴ *Ibid* at 42.

¹⁵⁵ Miller, *supra* note 141 at 257.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

system is not going unnoticed. Instead, it is a matter of great concern, not only—possibly—for the agencies themselves but also for academia.

Rudner talks about the necessity of having a “security culture” in a society in order not to have the media only report “sensationalistically”.¹⁵⁸ In an area of privacy-sensitive information where any information is only being reluctantly released to a small group of people, it is indeed difficult for the media to establish a security culture that would be necessary for a public which is meant to play an important role as a direct control ‘body’. Whether desirable or not, such a development is not being supported by the state institutions who see parliamentary control as the only option to allow the public (via electing their MPs) to have a say in the area of national security law.

Nonetheless, despite the big difficulties for the media to report on the agencies, often being heavily dependent on whistle-blowers and leaks (as well as public reports that often bring light only partway into the darkness), the media and thus the public may still be considered a control ‘body’ in a functional sense. In every single case of a scandal concerning the agencies, either on a national level, like the NSU-scandal, or on an international one, like the NSA scandal, the perception of the citizens, which was vastly shaped by the media coverage, had an effect both as de facto control mechanism and an official control mechanisms. For example, it helped mobilising public pressure necessary to trigger the Bundestag to establish a parliamentary committee of inquiry.

e) Judicial Control

Judicial control is “to be strictly distinguished [from parliamentary control].”¹⁵⁹ According to Gusy, parliamentary control is focussed on the “issues of the political majority” and whether the democratic requirements were upheld by the agencies. In contrast, the courts are “reviewing the rights of the affected minorities”, thus the rights of individual citizens.¹⁶⁰ Often, however, the citizens do not even know about the fact that their rights have been violated. Indeed, the obligation to maintain secrecy in the area of national security often prevents an effective judicial control. Since this thesis concentrates on the parliamentary control of intelligence agencies, I will not further elaborate on judicial control in general. It is, however, necessary to explain the role of the Constitutional Court in matters of national security law a bit more extensively because of its great influence on the development of notions and laws concerning the agencies as well as the control bodies (cf.: NSA-Committee of Inquiry”).

¹⁵⁸ Martin Rudner, “Who watches the watches of the Watchers?” in Wolbert K. Smidt et al, eds, *Geheimhaltung und Transparenz* (Münster: Lit-Verlag, 2007) at 218.

¹⁵⁹ Gusy, “Grundrechte”, *supra* note 30 at IX.

¹⁶⁰ “Parlamentarische Kontrolle fragt zentral danach, ob die aus dem Demokratieprinzip stammenden Bindungen an Gesetze und politische Weisungen der Regierung eingehalten sind. [...] prüfen Gerichte, ob die Rechte der von staatlicher Tätigkeit betroffenen Bürger gewahrt sind.” (Translation mine). *Ibid.*

III. The Role of the Federal Constitutional Court

1. Constitutional Guarantee of Judicial Review

Art. 19 (4) of the *Basic Law* mandates the general guarantee of judicial review for every individual and, thus, a fundamental right to justice.¹⁶¹ “Should any person’s rights be violated by public authority, he may have recourse to the courts. [...] The second sentence of paragraph (2) of Article 10 [(enabling the G10 Commission)] shall not be affected by this paragraph.” Each individual is entitled to bring a constitutional complaint before the court if he/she believes that the state encroached upon his/her fundamental rights.¹⁶²

2. Requirement of Judicial Decree: Art. 13 III–V of the *Basic Law* (*Richtervorbehalt*)

Art. 13 of the *Basic Law* protects the inviolability of the private home. A judicial order needs to be obtained before the authorities may start with any surveillances by technical means inside the private home.

3. The Role of the Federal Constitutional Court

The Constitutional Court’s decisions are final, binding on all state authorities, and deal with the compliance with the constitutional law exclusively. The Court is therefore not an appellate court and does not have the power of initiation. Apart from the role in cases of disagreements between the *Bund* and the *Länder*, the Constitutional Court is also responsible for “[c]onstitutional review of disputes between the highest bodies of the state¹⁶³; [...] [j]udicial review [...] either as a concrete norm control¹⁶⁴ or preliminary ruling [...] or as a so-called abstract norm control¹⁶⁵; [c]onstitutional complaint by citizens and others in cases of violation of basic rights; [i]ndictment and similar procedures [...] [as well as] [e]lection dispute procedures.”¹⁶⁶

In general, one might say that the Court “tries in principle to expand its control competence as far and as generously as possible”.¹⁶⁷ The Court “increased its control primarily in the area of basic rights”, since those rights left space for interpretation.¹⁶⁸ If dealing with constitutional complaints, “[e]very Act of Parliament can be directly reviewed, so the

¹⁶¹ Christoph Enders, “Art. 19 [Einschränkung von Grundrechten]” in Volkar Epping & Christian Hillgruber, eds, *Beck’scher Online Kommentar - Grundgesetz*, 31st edition (Beck-Online, 2016) at 51.

¹⁶² Art. 93 I 4a GG.

¹⁶³ Art. 93 I 1 GG.

¹⁶⁴ Art. 100 I GG.

¹⁶⁵ Art. 93 I 2 GG.

¹⁶⁶ Alfred Rinken, “The Federal Constitutional Court and the German Political System” in Ralf Rogowski & Thomas Gawron, eds, *Constitutional courts in comparison: the U.S. Supreme Court and the German Federal Constitutional Court* (New York: Berghahn Books, 2002) at 55.

¹⁶⁷ Werner Heun, “Access to the German Federal Constitutional Court” in Ralf Rogowski & Thomas Gawron, eds, *Constitutional Courts in Comparison: the U.S. Supreme Court and the German Federal Constitutional Court*, 2nd edition (New York; Berghahn Books, 2016) at 76; referring to: B.O. Bryde, *Verfassungsentwicklung. Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland* (Baden-Baden: Nomos 1982) at 167.

¹⁶⁸ *Ibid* (Heun) at 76, 77.

regulations concerning federal competencies and legislative procedures often come into play. In relation to court decisions, constitutional law does not set any limits on review by the Constitutional Court.”¹⁶⁹ Kranenpohl talks about the function of the Constitutional Court in the German state as a “*veto player*, *reserve legislator*, and *agenda setter*”.¹⁷⁰ Thus, he is referring to the right of the Court to “nullify crucial political decisions (see arts. 78; 82 (1) and 95 (3) of the *Federal Constitutional Court Act*), [whereas it] started early on to declare norms simply ‘incompatible’ with the *Basic Law*, [it may] specify requirements (sometimes very detailed) to the legislators [and it may] nullify a law and set out requirements for constitutionally compliant legislation [or] simply appeal for legislative change, which puts the issue on the legislative’s agenda all the same.”¹⁷¹

4. The Court’s Influence on the Shaping of Parliamentary Control and National Security Law

The Constitutional Court also severely influenced the role and understanding of Parliamentary control and the status quo of the existing security architecture in Germany. Several major decisions and concepts that have been developed by the Court’s case law have also shaped today’s understanding of parliamentary control. The law on the German Parliamentary Control Panel also explicitly mentions some limitations to the control power of the Panel that were developed by the Court. The decisions are now considered as the major guideline for those limitations as well as for parliamentary questions and the committees of inquiries. One of these concepts is the so-called core area of executive autonomy (*Kernbereich der exekutiven Eigenverantwortung*), a principle that is based on the separation of powers. In one of the Court’s famous decisions on the Flick-Committee of Inquiry, it elaborated that, although the government is in general obliged to ensure that the parliament has enough information to fulfil its control function effectively, it may deny the disclosure of information or the handing over of files if the information belongs to the government’s core area of executive autonomy, “a confidential initiative, advisory and action area”.¹⁷² This area particularly includes the “internal will formation, as it manifests itself in cabinet meetings as well as in inter-ministerial and overarching deliberations and votes.”¹⁷³ The obligation to disclose information is therefore somehow graduated (*abgestuft*). The closer the overall information gets to the core area, the less the government has an obligation to disclose. It is an attempt to find a kind of balance between the need for protection of the decision-making process and the

¹⁶⁹ *Ibid* at 78.

¹⁷⁰ Uwe Kranenpohl, “Decision Making at the German Federal Constitutional Court” in Ralf Rogowski & Thomas Gawron, eds, *Constitutional courts in comparison: the U.S. Supreme Court and the German Federal Constitutional Court*, 2nd edition (New York; Berghahn Books, 2016) at 148.

¹⁷¹ *Ibid* at 149; *Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz)*, Federal Law Gazette I, 1993 at 1473, last amended by Article 8 of the Regulation of 31 August 2015, Federal Law Gazette I, 2015 at 1474.

¹⁷² “[...] einen nicht ausforschbaren Initiativ-, Beratungs- und Handlungsbereich.” (Translation mine). *Flick-Untersuchungsausschuss*, *supra* note 128 at 173.

¹⁷³ “[...] interne Willensbildung, wie sie sich in Kabinettsitzungen sowie in ressortsinternen und -übergreifenden Beratungen und Abstimmungen herausbildet.” (Translation mine). Nees, *supra* note 22 at 677.

decision itself with the right of, for example, the legislature to gain access to information. “The principle of the separation of powers is therefore the basis as well as the legal restriction of the rights of parliamentary control.”¹⁷⁴

Another concept developed by the Court that is being used to set a limit to parliamentary control of the government is that of ‘Public Weal’ or ‘Welfare of the State’ (*Staatswohl*). The parliamentary right to gain access to information does have to stand back if the welfare of the state would otherwise be endangered. There is no legal definition of welfare of the state, making it a very vague legal concept. Several examples of rules¹⁷⁵ that are to be found in the different Acts on security agencies as well as on parliamentary control have been developed to grasp the concept somewhat better. In general, “the question of what serves the welfare of the state or [...] is detrimental to the state's well-being cannot be answered in an abstract and conclusive manner, but only on the basis of the concrete individual case and weighing up the legal goods concerned.”¹⁷⁶ The Constitutional Court has, however, decided that the welfare of the state is a matter of concern for both parliament and government. Therefore, the government may in general not refuse to disclose information to the Bundestag or its committees and panels because of a possible threat to the welfare of the state, as long as the Bundestag makes sure that the information remains strictly confidential.¹⁷⁷ Furthermore, the Court decided in several instances that the parliament only had the right to get access to information if the government was the responsible authority in the areas concerned and only after the final decision was made.¹⁷⁸

5. New Leading Case Law in the Field of National Security Law

In 2016, the Constitutional Court had to deal with the *Immere Sicherheit* and the conflicting tension between liberty and security as well as with the claim of parliamentarians to get access to information contrary to the will of the government. I will give a short overview of two leading recent decisions: in the first case the Court ruled in favour of “liberty” arguments, in the second in favour of “security” arguments.

The first important decision by the Constitutional Court in 2016 was the so-called *Bundeskriminalamt*-decision. The *Bundeskriminalamt* (“BKA”) is the Federal Criminal Police Office of Germany. The parliament had increased its legal competences, providing the BKA not only with prosecutorial but also intelligence powers, for example certain covert surveillance powers to contain the threat of international terrorism. As a result, the Constitutional Court received

¹⁷⁴Christoph Schnabel, “Der Kernbereich exekutiver Eigenverantwortung als Schranke der Informationsfreiheit” (2012) DÖV 192 at 193.

¹⁷⁵Warg, *supra* note 25 at 1266.

¹⁷⁶“die Frage, was dem Wohl des Staates dient oder [...] dem Staatswohl abträglich ist, kann nicht abstrakt und abschließend, sondern nur anhand des konkreten Einzelfalls und unter Abwägung der betroffenen Rechtsgüter beantwortet werden.” (Translation mine). *Ibid* at 1266.

¹⁷⁷*Untersuchungsausschuss Gebeimgefängnisse*, *supra* note 126.

¹⁷⁸*Ibid.*; *Rüstungsexport*, BVerfGE 137, 185 [*Rüstungsexport*].

several constitutional complaints by individuals who were concerned that the new powers would lead to an encroachment of the executive on fundamental rights. The Constitutional Court decided (5:3) that those powers were generally compatible with the *Basic Law*, emphasising, however, the principle of proportionality:

Powers that constitute a serious interference with privacy must be limited to the protection or legal reinforcement of sufficiently weighty legal interests; require that a threat to these interests is sufficiently specifically foreseeable; may, only under limited conditions, also extend to third parties from whom the threat does not emanate and who belong to the target person's sphere; require, for the most part, particular rules for the protection of the core area of private life as well as the protection of persons subject to professional confidentiality; are subject to requirements of transparency, individual legal protection, and supervisory control; and must be supplemented by deletion requirements with regards to the recorded data.¹⁷⁹

The Court furthermore developed certain prerequisites for information sharing between different intelligence agencies or with the police. It therefore defined the threshold of “the principle of a hypothetical re-collection of data”, meaning that an authority may only share information with another authority if it would still be legal to collect the data also for the new purpose.¹⁸⁰ The Court did also establish certain limitations to the strict application of the principle. The Court's decision prompted different reactions: on the one hand, there were many grateful and relieved voices that the BKA Act will have to be amended by the Parliament. On the other hand, some scholars and, in particular, members of the respective authorities were very critical, pointing out that the Court had transcended its constitutional role, in particular, by impinging on the Parliament's area of competence, a claim that was also supported by two judges who released dissenting opinions.¹⁸¹

The second decision that had a great impact on the perception of the security architecture of Germany concerned the so-called NSA-list of ‘selectors’. In the context of the NSA scandal, revealed by Edward Snowden, it became known that the BND had received a list from the NSA, which contained certain search criteria like IP- and E-mail addresses, in other words, information that could be used for telecommunication surveillance. The data that were being monitored by the BND would then, in a first step, be checked with the help of a so-called “G10-Filter”¹⁸², making sure that neither data that were protected by Art. 10 of the *Basic Law* nor data that needed to be filtered to protect German interests were being searched for.¹⁸³ The BND would then, in a second step, go through the rest of the data by using a list of selectors and finally transfer the results back to the NSA.¹⁸⁴

It became, however, apparent to the BND that firstly, the NSA transmitted selectors that were directed against German interests and that secondly, the filters did not work reliably enough. Therefore, data of German citizens and other sensitive data were being released to the NSA. After the revelations of Snowden, the Parliamentary Control

¹⁷⁹ *BKA - Gesetz*, BVerfGE 141, 220 at headnote 1b), English version online:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/04/rs20160420_1bvr096609en.html;jsessionid=DCA8CF52BB73A49AC3D3F374FEE0729F.2_cid370?__blob=publicationFile [BKA-Gesetz].

¹⁸⁰ *Ibid* at headnote 2.

¹⁸¹ Lindner & Unterreitmeier, *supra* note 4 at 90.

¹⁸² Nees, *supra* note 22 at 674.

¹⁸³ *Selektorenliste*, BVerfG, Beschluss des Zweiten Senats vom 13. Oktober 2016 - 2 BvE 2/15 at 5 [Selektorenliste].

¹⁸⁴ Nees, *supra* note 22 at 674.

Panel, the G10 Commission as well as the NSA-Committee of Inquiry demanded the disclosure of the list of selectors to them. The Government rejected their claim. It emphasised the importance of the cooperation with the NSA and the intelligence-sharing alliance known as the Five Eyes (US, UK, Canada, Australia and New Zealand). If the information became known to the public, foreign intelligence agencies might not want to collaborate with the BND anymore, which would constitute a great danger to Germany. They furthermore referred to a bilateral security agreement with the US and the “Third Party Rule”.¹⁸⁵

The Constitutional Court finally ruled that the government did not have to disclose the list of selectors to the NSA-Committee of Inquiry. It struck a balance between the right to information that generally also included the disclosure of the list of selectors and the Executive’s “interest in an exercise of duties that was adequate to its functions and administrative nature”.¹⁸⁶ It particularly emphasised the importance of future collaborations with foreign security agencies and the fact that, due to international law (the agreement as well as the “Third Party Rule”), the US would have to agree on disclosing the list. The decision of the Court was—once again—highly controversial. The security agreement with the US was not an agreement that the Bundestag had entered into; and in view of the fact that the Constitutional Court had decided—on a different matter—that “communications on contacts with foreign intelligence services [...] may not simply be withdrawn from the information access of a committee of inquiry for reasons of threat to the state’s weal”¹⁸⁷, the Court’s decision came as a surprise to many. Hans-Christian Ströbele, an MP of Bündnis90/Die Grünen and member of the Parliamentary Control Panel, called the decision a “disappointment”.¹⁸⁸ As it seemed to become even easier now to bypass parliamentary control by referring to the cooperation with other foreign agencies¹⁸⁹, he furthermore concluded: “To clarify the activities of the secret services one can at most hope for whistleblowers.”¹⁹⁰ In the following, in order to appraise Ströbele’s claim, the parliamentary control mechanisms and the historical background of the German control system will be described in detail.

¹⁸⁵ “According to this, information should only be passed on to third parties with the consent of the author or be used for a different purpose.” (“Hiernach dürften Informationen nur mit dem Einverständnis des Urhebers an Dritte weitergegeben oder zu einem anderen Zweck verwendet werden.”) (Translation mine). *Selektorenliste*, *supra* note 183 at 53; *Ibid* at 48 ff.

¹⁸⁶ “[...] funktionsgerechter und organadäquater Aufgabenwahrnehmung.” (Translation mine). *Ibid* at 158.

¹⁸⁷ “[...] Mitteilungen über Kontakte mit ausländischen Geheimdiensten [...] dem Informationszugriff eines Untersuchungsausschusses nicht ohne Weiteres aus Gründen der Gefährdung des Staatswohls entzogen sind.” (Translation mine). *Untersuchungsausschuss Geheimgefängnisse*, *supra* note 126 at 134, cited in Nees, *supra* note 22 at 680.

¹⁸⁸ Melanie Heike Schmidt, “Brisante Spähliste bleibt geheim: Ströbele warnt vor Kontrollverlust”, *Neue Osnabrücker Zeitung* (16 November 2016), online: www.noz.de/deutschland-welt/politik/artikel/806467/brisante-spahliste-bleibt-geheim-stroebele-warnt-vor-kontrollverlust.

¹⁸⁹ Hans-Christian Ströbele, “Bundesverfassungsgericht erlaubt die Geheimhaltung der NSA-Selektoren gegenüber Abgeordneten des Deutschen Bundestages”, *Ströbele Online* (15 November 2016), online: www.stroebele-online.de/show/9533539.html?searchshow=selektorenliste.

¹⁹⁰ Schmidt, *supra* note 188.

IV. Parliamentary Control and National Security Agencies

When the German Federal Republic was founded, there was no specific parliamentary control mechanism put in place for the intelligence agencies.¹⁹¹ According to Hansalek, this was due to the fact that the government was now legitimised by the majority of the parliament and that the “historical contrast” between the parliament and the government (“the Crown”) had been “overcome”.¹⁹² Therefore, this kind of control was not considered as necessary. For the following decades, the media reported about several scandals in which the intelligence agencies were somehow involved. These reports led to a certain pressure on the parliament and the government for reforms in the areas of the agencies themselves and of parliamentary control.¹⁹³ Finally, Germany got a permanent body exercising parliamentary control over the government in terms of their intelligence activities in 1978.

I have already given a short overview of the different mechanisms that are part of the parliamentary control of the intelligence services as well as of the different kinds of control powers that exist in Germany. In the following chapter, I will first reflect in more detail on the theory of parliamentary control before turning to the Parliamentary Control Panel and the practical implications of the development of a theory of parliamentary control. My thesis, which seeks to compare German and Canadian ways of legislatively controlling intelligence agencies, will concentrate on the Panel as the main and most important respective German institution and not go deeply into the other parliamentary control bodies that were outlined above. The historical development of the Panel, with an appraisal of its successes and weaknesses, is the most informative and meaningful point of comparison when demonstrating the structural weaknesses of parliamentary control that have not yet been overcome—in Germany almost 40 years after the Panel’s establishment, and almost 70 years since its predecessor model was founded. A historical review of the institution’s reforms and the slow developments that have taken place up to 2017 will be essential in what follows.

1. Parliamentary Control – in Theory

As mentioned above in the chapter about control mechanisms in general, it is interesting to see whether the different kinds and forms of control can also be applied to parliamentary control, above all in the field of national security. How far is a parliamentary right to oversee a government’s activities possible under a principle of a separation of powers? Can parliamentary control include the power to sanction the government? What defines its relationship to the judiciary and what are the differences between parliamentary and judicial control? How does supervision by the executive itself fit in? And foremost, what about the different forms of ‘control’, for example when should control be exercised and what is the scope of the control?

¹⁹¹ “[...] Überwindung des historischen Gegensatzes [...]” (Translation mine). Hansalek, *supra* note 14 at 5.

¹⁹² *Ibid.*

¹⁹³ *Ibid* at 6.

In principle, there should be no difference between parliamentary control of national security activities and the general parliamentary control. There might only be the need for some special provisions: on the one hand, how to control effectively, and, on the other, to respect the sensitive and confidential nature of the topics of national security. “The constitutionally relevant question is that of the level of legitimacy and a level of control which may be influenced by it.”¹⁹⁴ Gusy in particular argues for a “Prinzip der abgestuften Öffentlichkeit” (“principle of a graduated publicness”) as a tool to adapt the level of control to the necessary secrecy.¹⁹⁵

Parliamentary control is considered as a form of “political control”.¹⁹⁶ It is therefore not directly comparable to executive supervision or judicial control. It is indeed highly disputed how far the above-mentioned principles of control mechanisms can be applied to parliamentary control of activities of the national security agencies and thus to the government’s endeavours to strike a balance between the principles of security and liberty.

For the most part, parliamentary control is executed as a form of “review” mechanism, posing the least limits on the government’s activities. In some decisions of the Constitutional Court¹⁹⁷, review was indeed even considered as the only legitimate way of parliamentary control. However, there are also many dissenting views, not just in terms of what is desirable but also in terms of what the legislature in fact does. In particular, as Peitsch and Polzin mention, “[i]n fact, parliamentary scrutiny is now an on-going control, as Parliament is involved by it, among other things, in the current political debate.”¹⁹⁸ Therefore, it would give a too limited impression of the control power of parliament if one only talked about its review powers. Parliamentary control can also guide and oversee the government’s and thus the intelligence services’ activities (“*directing control*”¹⁹⁹). The parliament may then have to give consent to a certain activity or it may set certain rules, limits and rights through legislation. This kind of control of the intelligence services is particularly important for the budget decisions of the parliament.²⁰⁰ The latter may also oversee current activities.²⁰¹ Thereby, it may “influence governmental decisions by the expression of the parliament’s will.”²⁰² “The effect of the *directing control* primarily rests upon its public visibility”, which can, however, often not be achieved in the field of national security.²⁰³ And the parliament is never allowed to get into the position to take over the general

¹⁹⁴ “[...] verfassungsrechtlich stellt sich die Frage nach dem Legitimationsniveau und einem gegebenenfalls dadurch mitgeprägten Kontrollniveau.” (Translation mine). Gusy, “Parl. Kontrolle”, *supra* note 16 at 38.

¹⁹⁵ *Ibid.*

¹⁹⁶ Peitsch & Polzin, *supra* note 132 at 388.

¹⁹⁷ E.g.: *Flick-Untersuchungsausschuss*, *supra* note 128 at 174.

¹⁹⁸ “Tatsächlich ist parlamentarische Kontrolle heute eine mitlaufende Kontrolle, da sich das Parlament unter anderem durch sie an der aktuellen politischen Diskussion beteiligt.” (Translation mine). Peitsch & Polzin, *supra* note 132 at 389.

¹⁹⁹ “Dirigierende Kontrolle”. (Translation mine). Hansalek, *supra* note 14 at 161.

²⁰⁰ *Ibid* at 162.

²⁰¹ *Ibid* at 163.

²⁰² “Die Regierung soll nicht nur nachträglich zur Verantwortung gezogen werden, sondern mittels parlamentarischer Willensäußerungen in ihren Entscheidungen beeinflusst werden.” (Translation mine). Singer, *supra* note 38 at 33.

²⁰³ “Die Wirkung dieser dirigierenden Kontrolle basiert vor allem auf der öffentlichen Wahrnehmbarkeit.” (Translation mine). *Ibid.*

competence and responsibility of the government.²⁰⁴ The core area of executive autonomy will and does mostly prevail over the claim to get access to information if the activity or the decision-making process have not yet been completed.²⁰⁵ Therefore, one may conclude that parliamentary control is mostly focussed on reviewing governmental activities and decisions once these activities and decisions have been completed.

This may lead us to the next important limitations on parliamentary control, the “minimum and maximum degree of [parliamentary] control.”²⁰⁶ The maximum degree of parliamentary control has already been outlined above: the limitations that the Constitutional Court has developed as well as the (constitutionally valid) limitations imposed by the different Acts. It has additionally been noted that this maximum mostly amounts to control through review and (very) limited control that has oversight dimensions. But what standard is to constitute the minimum degree of control? Hansalek distinguishes between two steps that may help to understand the constitutionally provided minimum. At first, deciding on the powers of committees of inquiries, the Constitutional Court has ruled that it is necessary to “interpret Art. 44 of the *Basic Law* in such a manner that the committee of inquiry has to be regarded as being endowed with the powers which it requires in order to be able to effectively deal with the pursued clarification of doubts about the lawfulness or fairness of governmental or administrative measures.”²⁰⁷ This decision can be interpreted in such a way that it contains a general statement on parliamentary control (rather than just pointing to the rights of the committees of inquiries). A minimum degree of parliamentary control is thus, firstly, determined by the powers needed to ensure its effectiveness. Secondly, the so-called “materiality principle” (*Wesentlichkeitsprinzip*) is relevant. This principle in general determines “whether a parliamentary law is required” as well as “the necessary regulatory density of the law.”²⁰⁸ The legislature is thus not allowed to delegate all its power to the executive; it has to stay the regulator in certain policy areas that are being determined on a case-by-case basis. Hansalek argues persuasively that “what applies to the legislative function, must also apply to the other functions of parliament, here its control function. [...] [Thus], the areas of the intelligence services, which are seen as essential, must be subject to parliamentary control.”²⁰⁹ The notion of being subject to parliamentary control would seem primarily to connote a legislative power of review; does that mean, however, that there is, to a certain degree, an obligation of parliament

²⁰⁴ Peitsch & Polzin, *supra* note 132 at 389.

²⁰⁵ Schnabel, *supra* note 174 at 194.

²⁰⁶ Hansalek, *supra* note 14 at 226,227.

²⁰⁷ “[...] als mit denjenigen Befugnissen ausgestattet anzusehen ist, derer er bedarf, um die aufgegebene Klärung von Zweifeln an der Gesetzlichkeit oder Lauterkeit von Regierungs- oder Verwaltungsmaßnahmen wirksam vornehmen zu können.” (Translation mine). *Ibid* at 227.

²⁰⁸ Grzeszick, *supra* note 10 at paras 105,106.

²⁰⁹ “Was für die Gesetzgebungsfunktion gilt, muss daher für die anderen Funktionen des Parlaments, hier die Kontrollfunktion, ebenso gelten. [...] [Somit] müssen die Gebiete der Nachrichtendienste, die als wesentlich einzustufen sind, einer parlamentarischen Kontrolle unterworfen werden.” (Translation mine). Hansalek, *supra* note 14 at 229.

to make use of its control powers? If so, can parliamentary control then be, inter alia, exercised as a minority right of the opposition? In addition, does a pure review mechanism sufficiently comply with the materiality principle?

As for the general parliamentary control functions, one additional competence of the institution may be its power to impose sanctions. These sanctions may either “constitute a reaction that occurs in the form of coercive measures to an unwanted while normally deviant behaviour as well as the legal consequences connected with a legal regulation.”²¹⁰ In general, parliamentary control is the “consequence of the [...] responsibility of the government to the parliament.”²¹¹ Parliamentary control is furthermore considered as necessary because of “the lack of individual legal aid”²¹², particularly in the field of national security. It is—again—one of the only instruments to curtail the power of the national security agencies and thus the government in an area where tremendous powers are transferred to the authorities, in particular in an area of politics which is very sensitive as regards civil liberties. However, as a form of political control, it does not really operate within the realm of objective criteria, as it is always exposed to partisan efforts of the different political parties and views²¹³, both those of the governmental parties and the parliamentary oppositional groups.

2. The Parliamentary Control Panel (*Das Parlamentarische Kontrollgremium*, “PKGr”)

As mentioned above, in 1978, the first official Commission of the Bundestag solely focussed on the intelligence triad, was established. In order to derive lessons from its weaknesses and its strengths that have become manifest throughout its history, it is important to look back to its genesis, its aims, the motives of its creators, and the many reforms and challenges it has faced throughout time. Therefore, this chapter will now focus on describing, analysing and evaluating the history and the mainly political influences that have shaped the PKGr from 1949 to 2017.

a) Historical Overview

Committee for the Protection of the Constitution (Ausschuss zum Schutz der Verfassung, “ASchutzV”), 1949

The ASchutzV was established in 1949 by the Bundestag to suppress unconstitutional extremism in the young Republic. Twenty-one parliamentarians were members of the ASchutzV, surprisingly even including one member of the

²¹⁰ “[...] eine Reaktion, die in Form von Zwangsmaßnahmen auf ein unerwünschtes in der Regel von einer Norm abweichendes Verhalten erfolgt, als auch die mit einer rechtlichen Regelung verbundenen Rechtsfolgen.” (Translation mine). *Ibid* at 164.

²¹¹ Singer, *supra* note 38 at 32; Art. 65 sentence 1,2 GG.

²¹² *Ibid* (Singer) at 33.

²¹³ Peitsch & Polzin, *supra* note 132 at 388.

Communist Party (the party later was prohibited by the Constitutional Court in 1956) and one member of an extremist right-wing party (DRP²¹⁴), who had no voting power. Its “task area” was defined to include “legislator tasks, controlling functions, monitoring tasks and initiating functions.”²¹⁵ The Committee’s powers were highly disputed, and this was one of the reasons why the ASchutzV was only set up in the first two legislative periods of the Bundestag. Afterwards, the Committee of Internal Affairs took over the tasks of the ASchutzV.²¹⁶ The fact that the ASchutzV included two members of extremist parliamentary groups is particularly surprising when reading about the reluctance of the popular parties in the 80s/90s to allow MPs of the parliamentary groups of Die Linke as well as Bündnis 90/Die Grünen to become members of the Control Panel (see below).

The Parliamentary Board of Trustworthy People (Das Parlamentarische Vertrauensmännnergremium, “PVMG”), 1956

In 1956, Chancellor Adenauer introduced the PVMG. The reasons for its establishment were, on the one hand, the establishment of the BND and, on the other hand, a scandal that had shaken the government, when the president of the BfV had moved to East Berlin and started to publicly criticise the West German government (“John-affaire”²¹⁷).

The members of the PVMG were not elected by the MPs as a whole but chosen by the parliamentary groups.²¹⁸ The Chancellor himself or someone appointed by him was the chair of the PVMG. According to Hansalek, this not only made it possible to “control the flow of information but also its evaluation and thereby the whole control process.”²¹⁹ An additional problem was the fact that the PVMG had to be reintroduced in each legislative period, enabling the Chancellor to stop its existence every four years. In addition, the PVMG did not have the right to claim access to information; rather, the government could decide whether or not to inform the PVMG on the activities of—in the beginning only—the BND. The government alone could therefore decide on the specific content and amount of information it was going to share with the PVMG.²²⁰ And even if the PVMG was being informed about current activities, it was not allowed to “pass resolutions”.²²¹ The PVMG was furthermore not allowed to self-initiate a meeting; instead, the Chancellor himself had to arrange the meetings.²²² This later changed under chancellor Willy Brandt who increased the powers of the PVMG by granting it the right to self-initiate a meeting.²²³

²¹⁴ Deutsche Reichspartei (the party disbanded itself in 1965).

²¹⁵ “1. Legislatorische Aufgaben 2. Kontrollfunktionen 3. Beobachtungsfunktionen 4. Initiativfunktionen.” (Translation mine). Germany, Ausschuss zum Schutz der Verfassung, (19 October 1949) at 3, cited in Hansalek, *supra* note 14 at 74.

²¹⁶ *Ibid* at 77.

²¹⁷ *Ibid* at 34.

²¹⁸ *Ibid* at 36.

²¹⁹ “[...] steuern den Informationsfluss, sondern auch die Informationsauswertung und damit den gesamten Kontrollprozess.” (Translation mine). Hansalek, *supra* note 14 at 36.

²²⁰ *Ibid*.

²²¹ *Ibid* (“Beschlüsse zu fassen”).

²²² *Ibid*.

²²³ Hirsch, *supra* note 102 at 146.

According to Hansalek, the way the PVMG was established by Adenauer shows the lack of power on the part of the Parliament. The MPs had not yet realised that they “not only could but had to act as a control institution”;²²⁴ instead, they “waived the right to build up a parliamentary committee which was explicitly legitimised by the Constitution”.²²⁵ For Adenauer, it was therefore possible to influence and use the PVMG for his own/the government’s advantage. True parliamentary control of the secret services remained a desideratum.

Pätsch-Affair/Phone-Affair, Reform 1964

In 1964, an official of the BfV complained that his work, which included intercepting the post and telephones for the allies, was illegal. As a whistleblower, he informed the journal “Der Spiegel” about details of his work (“Pätsch-affair”). The affair led to the creation of a parliamentary committee of inquiry since it was speculated that the BfV was trying to “bypass” its own limits of “intelligence work”²²⁶ by working closely together with the allies (“Telephone-affair”). The committee of inquiry could not find the evidence to support those speculations (not the least because the data it received were incomplete and a lot of the material had already been destroyed). The committee of inquiry concluded, however, that the Parliament should permanently control all federal intelligence agencies.²²⁷

Reform 1968/1969

In 1968, a committee of inquiry was established to decide whether the current state architecture (i.e., the different authorities, their cooperation and coordination) that was in place for the protection of the constitutional order and for counterintelligence tasks was sound and sufficient.²²⁸ The committee of inquiry, whose five members had been taken from the parliamentary groups and were all members of the PVMG²²⁹, published its final report (the so-called Hirsch-Report) in 1969. It concluded that it was a matter of “urgency” to create a permanent parliamentary control body.²³⁰ The reform proposal included the establishment of a “Committee of the German Bundestag for Affairs of the Intelligence Agencies” (*Ausschuss des Deutschen Bundestags für Angelegenheiten der Nachrichtendienste*), which would replace the PVMG. The committee should be constitutionally laid down by a new article in the Constitution (Art. 45a of the *Basic Law*).²³¹ A commissioner should furthermore be appointed who would be responsible for the

²²⁴ “[...] als Kontrollinstanz nicht nur agieren zu dürfen, sondern auch zu müssen, [...]” (Translation mine). Hansalek, *supra* note 14 at 34.

²²⁵ “[...] verzichteten auf einen ausdrücklich durch die Verfassung legitimierten Parlamentsausschuss.” (Translation mine). *Ibid.*

²²⁶ “Nachrichtenbeschaffung”.

²²⁷ Hansalek, *supra* note 14 at 38, see also Germany, Deutscher Bundestag, Untersuchungsausschuss, 4th Parl, BT-Drucksache IV/2170 (21 April 1964) at 5 [BT-Drucksache IV/2170].

²²⁸ Germany, Deutscher Bundestag, *Antrag*, 5th Parl, BT-Drucksache V/3442 (30 October 1968) [BT-Drucksache V/3442].

²²⁹ Germany, Deutscher Bundestag, *Antrag CDU/CSU, SPD, FDP*, 5th Parl, BT-Drucksache V/4445 (24 June 1969) at 1 [BT-Drucksache V/4445].

²³⁰ *Ibid.* at 8.

²³¹ *Ibid.*

unobstructed cooperation of the different intelligence agencies and for the information of the new committee on anything of importance in the national security sector.²³²

In 1969, a corresponding Bill was introduced in Parliament, trying to change the *Basic Law* according to Art. 79 II by introducing a new article that was supposed to lay down the constitutional basis for a parliamentary control committee of the intelligence agencies. The rights of the committee were supposed to match the broad ones of a committee of inquiry (see above). It was also laid down that the committee should be able to initiate an investigation on the request of two of its members or one-fourth of the members of the Bundestag.²³³ Despite the support of the majority of MPs in every parliamentary group of the Bundestag, the Bill did not receive the necessary two-thirds majority of votes and, thus, never entered into force. Some MPs were particularly reluctant to change the parliamentary control system since they, firstly, saw the reform as a restriction of the rights of the government and, secondly, were worried that the neo-Nazi party NPD²³⁴ would one day become a parliamentary group and thus take part in the control body.²³⁵

Enquête Commission, Reform 1973-1976

A few changes to the PVMG were introduced in the seventh legislature period. It was established that the chair of the PVMG should switch every three months among the MPs. The PVMG was furthermore now allowed to independently initiate a meeting.

In 1973, an Enquête Commission²³⁶ was established to assess whether changes to the *Basic Law* were necessary, thereby also analysing the status quo of the parliamentary control of the intelligence agencies in Germany. In contrast to the committee of inquiry of 1968/1969, the Enquête Commission did not consider it necessary to abolish the PVMG and to introduce another kind of commission.²³⁷ In the meantime, the PVMG had already become slightly more independent since the rotating position of the chairman had already been introduced. This might have influenced the Commission's assessment.

Evaluating the possibility of a new commission—to be laid down in a new article in the *Basic Law*—as proposed in 1968/1969, the Enquête Commission concluded that such a constitutional commission was not necessary.²³⁸ At first, the Commission mentioned the benefits that the introduction of such a commission and thus the change of the *Basic Law* might have: the commission could have its own proceedings and in its own right; it could initiate meetings at all times; the members could concentrate on their role in the commission, whereas the members of the current PVMG

²³² *Ibid.*

²³³ BT-Drucksache V/4445, *supra* note 229.

²³⁴ Nationaldemokratische Partei Deutschlands (National Democratic Party of Germany).

²³⁵ Hansalek, *supra* note 14 at 42.

²³⁶ Enquête Commissions are parliamentary working groups which are to solve long-term questions in which different legal, economic, social or ethical aspects have to be weighed. Their aim is to find a joint solution to those problems.

²³⁷ BT-Drucksache 7/5924, *supra* note 26 at 60.

²³⁸ *Ibid* at 61.

had many different obligations; the government might be more willing to share information with a commission that was based on and laid down in the Constitution. Despite those benefits, the Enquête Commission concluded that it preferred to keep the PVMG for the following reasons: members of a commission might use their control powers for partisan reasons; the commission might duplicate work that the Committee on Internal Affairs and the Defence Committee were already undertaking; the members would not have sufficient backing by their parliamentary groups since they would have to remain silent on the information they would gain access to. Additionally, they were apprehensive that information might get leaked—either by the large number of members of the commission or by the necessary staff of such a commission. Furthermore, radical parties might be elected into parliament and would then have a seat on a commission whose duty it was to control the intelligence services—this could mean that the government would no longer be willing or, indeed, it might no longer even be possible to share any information with the commission.²³⁹

Despite the positive evaluation of the PVMG by the Enquête Commission and some structural changes, the PVMG was still under the influence of the government and did not have enough rights to effectively control it. As a consequence and therefore not surprisingly, from 1976 onwards, the chairmen of the parliamentary groups did consider the meetings of the PVMG as “no longer achieving their objectives.”²⁴⁰ For that reason the PVMG did not hold any more meetings and was “de facto dissolved.”²⁴¹

Parliamentary Debate and Bill, 1977-1978

The Bill to establish a control commission in parliament in 1977 differed from the proposal of the Commission in 1968. The parliamentary groups wanted to obviate the necessity to change the *Basic Law* and thus decided to establish the commission as a “parliamentary auxiliary body (*Hilfsorgan*)”.²⁴² The Parliamentary Control Commission (*Parlamentarische Kontrollkommission*, “PKK”) was to review all three federal intelligence agencies directly (not ‘indirectly’ by controlling the government).²⁴³ However, the political responsibility for the agencies would stay with the Chancellor and the respective ministers.²⁴⁴ The rights of the Bundestag and the parliamentary committees were not to be changed by that law.²⁴⁵ A particularly far-reaching feature of the Bill was that it obliged the government to give full information about the activities of the intelligence agencies to the commission whenever requested.²⁴⁶ The Bill

²³⁹ *Ibid* at 62,63.

²⁴⁰ Hansalek, *supra* note 14 at 48.

²⁴¹ *Ibid*.

²⁴² *Ibid* at 51.

²⁴³ See § 1 of the Bill: Germany, Deutscher Bundestag, *Gesetzesentwurf SPD, FDP*, 8th Parl, BT-Drucksache 8/1140 (09 November 1977) [BT-Drucksache 8/1140]

²⁴⁴ See § 4 I of the Bill: *Ibid*.

²⁴⁵ See § 4 II of the Bill: *Ibid*.

²⁴⁶ Hansalek, *supra* note 14 at 51.

was, however, revised, and the final version was less eager to extend the rights of the parliament. When debating the legislation, many parliamentarians themselves were particularly worried that MPs would not keep all information secret and that the disclosure of information would prevent allied intelligence agencies from cooperating with their German counterparts.²⁴⁷

The Parliamentary Control Commission (Die Parlamentarische Kontrollkommission, “PKK”), 1978

In 1978, the PKK was established (“*PKK Act*”²⁴⁸). It was the first “institutionalised control body that was equipped with sufficiently legitimised powers and whose area of responsibility covered [...] all three intelligence agencies.”²⁴⁹ The PKK was considered as a parliamentary panel (*Gremium*) and therefore not independent of the Bundestag. Differing from the original draft, the first paragraph of the new Act defined the organ to be controlled by the PKK as the government, thus not the intelligence agencies in particular.²⁵⁰ This was partly necessary due to the principle of the separation of powers and partly because the responsibility of the government would have otherwise—at least in some form—shifted to the parliament. Art 65 of the *Basic Law* states that the minister may “conduct the affairs of his department independently and on his own responsibility”²⁵¹ (so-called *Ressortprinzip*). A direct parliamentary control of the intelligence services would thus have been a violation of that principle and therefore a breach of the *Basic Law*.

Particularly important was the fact that the PKK was not competing with the rights of the parliament and its committees, because according to § 1 II *PKK Act*, “the rights of the Bundestag and its committees shall remain unaffected.”²⁵² Furthermore, the G10 Commission stayed the sole organ responsible for the agencies’ activities in terms of Art. 10 of the *Basic Law*.²⁵³ The political responsibility of the government remained unaffected by the control,²⁵⁴ meaning that, at this stage, the parliament had rejected an oversight function for the commission, thus only allowing it to review the activities ex post.²⁵⁵ MP Liedtke said during the legislation process that an oversight or accompanying control should not be possible because “[t]he Control Commission has to protect the fundamental rights of the

²⁴⁷ Germany, Deutscher Bundestag, *Parliamentary Debates*, 8th Parl, Plenarprotokoll 8/55 (10 November 1977) at 4279 ff. [Plenarprotokoll 8/55], see also Hansalek, *supra* note 14 at 51.

²⁴⁸ *Gesetz zur Parlamentarischen Kontrollkommission*, Federal Law Gazette I, 1978 at 453 f. [*PKK Act 1978*].

²⁴⁹ “[...] institutionalisierte und mit ausreichend legitimierten Befugnissen ausgestattete Kontrollinstanz, deren Zuständigkeitsbereich alle drei ND [...] umfasste.” (Translation mine). Hansalek, *supra* note 14 at 30.

²⁵⁰ See Germany, Deutscher Bundestag, Rechtsausschuss, *Beschlußempfehlung und Bericht*, 8th Parl, BT-Drucksache 8/1599 (08 March 78) [BT-Drucksache 8/1599].

²⁵¹ *GG*, see <<https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic-law-data.pdf>>.

²⁵² “Die Rechte des Bundestags und seiner Ausschüsse bleiben unberührt.” (Translation mine).

²⁵³ § 2 III *PKK Act 1978*.

²⁵⁴ § 3 *PKK Act 1978*.

²⁵⁵ See e.g. opinion of Dr. Klein in the legislative procedure: Germany, Deutscher Bundestag, *Parliamentary Debates*, 8th Parl, Plenarprotokoll 8/78 (09 March 1978) at 6100 [Plenarprotokoll 8/78].

citizens from attacks by the intelligence services. This means that this Commission cannot and must not be subject to co-decision.”²⁵⁶

According to § 4 of the *PKK Act*, the Bundestag had to elect the members of the commission among its members. In general, the members of committees are selected by the respective parliamentary group.²⁵⁷ By ensuring that the members of the PKK are elected by the Bundestag, the members of the PKK/PKGr²⁵⁸ are supposed to be more trustworthy because MPs of other parliamentary groups might also have voted for them.²⁵⁹ The Bundestag furthermore got the right to decide upon the number of members as well as the composition and procedures of the commission. Making use of this right, the first instalment of the commission consisted of eight members including all chairmen of the parliamentary groups (*Fraktionsvorsitzende*).²⁶⁰ The members were to be elected with a relative majority. In the Bill²⁶¹, a qualified majority had been intended. However, the Constitutional Court had ruled with respect to the G10 Commission that a qualified majority did not provide sufficient protection against an improper and ‘one-sided’ filling of the commission.²⁶²

For the German Bundestag as well as its committees and different organs, one major principle is that of discontinuity. In each legislative period, the parliament needs to be completely renewed. Committees are dissolved and can only resume work after a complete reconstitution. The Parliamentary Control Body is an exception to the rule: it continues its work until the new Bundestag will have elected the new members of the PKK/PKGr.²⁶³ This exception emphasises the great importance of the control body: the control duties of its members must be guaranteed at all times. According to § 2 (1) 2 *PKK-Act* of 1978, the PKK has the unlimited right to request the disclosure of information on the intelligence services’ activities from the government, both for general and for particular occurrences. General occurrences were and still are considered to be routine procedures, “the regular, typical processes and working results”, which have to be known for an effective control.²⁶⁴ Further factors that fall into the scope of “general occurrences”

²⁵⁶ “Die Kontrollkommission hat die Grundrechte der Bürger vor Übergriffen durch die Geheimdienste zu schützen. Das beinhaltet, daß dieser Kommission keine Mitentscheidung gegeben sein kann und darf.” (Translation mine). *Ibid* at 6101.

²⁵⁷ See § 57 II *Rules of Procedure of the German Bundestag*.

²⁵⁸ PKGr: Parlamentarisches Kontrollgremium; successor of PKK, see below: Parliamentary Control Panel.

²⁵⁹ Singer, *supra* note 38 at 61.

²⁶⁰ Plenarprotokoll 8/78, *supra* note 255 at 6100.

²⁶¹ Plenarprotokoll 8/55, *supra* note 247 at 4276.

²⁶² *Abhörurteil*, *supra* note 139 at 1 ff.; Hansalek, *supra* note 14 at 55; “The qualified majority is a majority in the case of important decisions in Parliament or in other bodies, which exceeds the simple majority. The proportion of the consent of the voters is set beforehand, e.g. two-thirds or three-thirds. According to the Basic Law, constitutional amendments require a two-thirds majority of the members of the Bundestag and the votes of the Bundesrat. In the majority of cases, a simple majority is sufficient for the vote in the Bundestag, which is the majority of the deputies present in a vote.” (Translation mine) Germany, Bundestag website, online: http://www.bundestag.de/service/glossar/glossar/Q/qual_mehrheit/246162; The relative majority is the weakest demand for majority decisions. It is given when a person receives more votes than any other person, even if not more than half of the votes are cast on him. The direct candidates in the German federal elections are elected by a relative majority.

²⁶³ *PKK Act* 1978.

²⁶⁴ Singer, *supra* note 38 at 88.

are, for example, the following: “the general briefing on [...] foreseeable changes, the creation of personal data files, the issuing of general administrative provisions” as well as, for example, the co-operation of the BfV with the Offices for the Protection of the Constitution of the Federal States.²⁶⁵ It is still being debated up to this point what exactly “occurrences of particular importance” means and how one should define this term. The discussion will be picked up below.

Furthermore, there were two legislative shortcomings regarding the information requirements laid down in 1978.²⁶⁶ Firstly, the commission was not a legitimate applicant in the court proceedings between governmental bodies (*Organstreitverfahren*) before the Constitutional Court if the government did not disclose certain information. It could therefore not judicially claim that information.²⁶⁷ Secondly, the government had the right to decide on the “date, nature and extent” of the disclosure.²⁶⁸ Therefore, the paragraph de facto made the commission dependent upon the government. Often, the commissioners only heard about certain scandals through the media.²⁶⁹ The work of the commission therefore lacked both efficiency and effectiveness. The provision was later abolished when it came to be seen that it limited the right of the PKK to request information too much (see below). It is a good example, however, to point out that the legislators at that time were thinking of control mechanisms that would review, not oversee, the agencies’ activities.²⁷⁰ Furthermore, the fact that the paragraph spoke of general *and* particular occurrences meant that general occurrences did not implicate all occurrences and activities, since general occurrences would otherwise not have been listed separately.²⁷¹

However, when the parliamentary groups introduced the Bill, one MP particularly mentioned that parliament should not put limits on its right to request information and thus its right to control the executive in the legislation. He considered it indispensable to be given all information; it should be for the executive to explain why certain information had to be kept secret and could not be disclosed to the commission. It was considered important particularly in order to gain public trust that the parliament was aiming at protecting citizens’ rights to the maximum extent possible.²⁷² There were also differing opinions: one MP stated that, due to the unlimited right to information, other intelligence services from other countries would no longer want to collaborate with the German services, and that,

²⁶⁵ *Ibid.* – The Federal States (“Länder”) have their own parliamentary control committees in the “Landtage” (as well as their own Federal State Offices for the Protection of the Constitution (*Landesämter für Verfassungsschutz*)).

²⁶⁶ Hansalek, *supra* note 14 at 57.

²⁶⁷ *Ibid.*

²⁶⁸ See § 2 II *PKK Act 1978*.

²⁶⁹ Hansalek, *supra* note 14 at 57.

²⁷⁰ Arndt, *supra* note 138 at 1375.

²⁷¹ Hansalek, *supra* note 14 at 65.

²⁷² Plenarprotokoll 8/55, *supra* note 247 at 4277 (MP Gerhard Jahn).

furthermore, many people would no longer give information in fear of their lives.²⁷³ Therefore, in the final law, the right to information was more limited.

The commission had to meet at least each quarter of the year. Each member was allowed at any time to request a meeting and a briefing (“minority right”²⁷⁴).²⁷⁵ This statutory provision is still part of today’s Act. However, notwithstanding this power in the hands of individual members, “the cycle of meetings that is being prescribed by the statute is now being considered as falling far too short because of the constitutional significance of the parliamentary control of the intelligence services”²⁷⁶ These days, the Parliamentary Control Panel is only holding a meeting every month.²⁷⁷ According to § 5 of the *PKK Act*, the proceedings of the commission are kept confidential. They remain confidential even if a member has left the commission. The Act did not include any rights of the commission to disclose information to the public or the rest of the Bundestag, for example when the government did not act according to the law. The first act on the establishment of a parliamentary control commission was—surprisingly—rather short (consisting of six sections in total only). Considering how big a step it was to disclose certain information to the parliament for the first time, this brevity comes as a surprise.

A reform of the Act was intended at a later date, i.e. after one would have had some experience with the commission.²⁷⁸ The PKK, therefore, had many more rights than its predecessor, the PVMG. The fact that it was not to be dissolved after one legislative period clearly shows its special status compared to other legislative committees. Nevertheless, the PKK was still strongly dependent on the government and the information it would disclose – at the government’s own discretion.

The Reform of the PKK Act in 1992

Since the establishment of the Commission, the necessity of the Commission in general was no longer a matter of debate. However, the parliamentary groups debated possible legal improvements and changes, particularly since many parliamentarians considered the Commission to be rather ‘inadequate’.²⁷⁹ Furthermore, the old *raison d’être* of the intelligence services, the East-West-conflict, had ended, making it necessary to discuss future changes of the mandate, possible future challenges to the services and thereby also an effective control mechanism.

²⁷³ *Ibid* at 4280.

²⁷⁴ Singer, *supra* note 38 at 74.

²⁷⁵ § 5 II and III of the *PKK Act*.

²⁷⁶ “Angesichts der verfassungsrechtlichen Bedeutung der parlamentarischen Kontrolle der ND wird dieser gesetzlich vorgegebene Sitzungsturnus für völlig unzureichend gehalten.” (Translation mine). Singer, *supra* note 38 at 74.

²⁷⁷ *Ibid*.

²⁷⁸ Germany, Deutscher Bundestag, *Gesetzesentwurf CDU/CSU, SPD, FDP*, 12th Parl, BT-Drucksache 12/1643 (26 November 1991) at 4 [BT-Drucksache 12/1643].

²⁷⁹ *Ibid* at 1.

The Bill that was introduced included the obligation of the government to inform the commission about ‘*all*’ “occurrences of particular importance”.²⁸⁰ This wording was changed in the legislative process to ‘*the*’ occurrences. Another change in the new law that empowered the Commission was the obligation of the government to hand over drafts of the annual budget plans of the intelligence services to the Commission for consultation. The government would then inform the PKK about the implementation of the plans in the following year if the PKK asked for that kind of information.²⁸¹ The PKK “can examine these plans to ensure that they are politically appropriate, a right which is denied to the Panel according to § 10 BHO [*Bundeshaushaltsordnung*; “Federal Budget Code”]. A gap is closed here.”²⁸² “The government should now only be able to reject the disclosure of information [on the budget plans] because of compelling reasons of intelligence access.”²⁸³ In the case of a rejection of the disclosure, the PKK could request a rationale from either the responsible minister or the head of the Federal Chancellery (for the BND). A general obligation to give reasons for a refusal to give information was not codified; it would have led to the possibility that the refusal itself would have allowed the PKK members to draw a conclusion about the nature of the occurrence.²⁸⁴ Furthermore, for the first time, the draft allowed for the “evaluation of current occurrences by members of the committee where prior agreement from a two-third majority of the present members had been obtained”. Indeed, these evaluations may even be undertaken in public. It was clarified later that this only meant “an evaluation of occurrences, not a factual description.”²⁸⁵

Further rights were codified in the respective governing acts or statutes for the different intelligence agencies. Surprisingly, no additional restrictions to the rights of the PKK were added to the law. Instead, the law was combined with a binding agreement that the government would allow for the inspection of files and the interrogation of employees of the intelligence services in front of the Commission under certain circumstances.²⁸⁶ However, this agreement was not made part of the statutory law: “the Federal Government uttered constitutional reservations referring

²⁸⁰ § 2 I 1 of the Bill 1992 (BT-Drucksache 12/1643, *supra* note 278) *Ibid.*

²⁸¹ § 2 I 3 and 4 of the Bill 1992 (*Ibid.*); § 2 I of the *PKK Act of 1992* (*Gesetz zur Änderung des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes und zur Änderung des Gesetzes zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*, Federal Law Gazette I, 1992 at 997 [PKK Act 1992]).

²⁸² “[...] kann diese Pläne nach ihrer politischen Zweckmäßigkeit überprüfen, was dem Gremium nach § 10 BHO versagt ist. Eine Lücke wird hier geschlossen.” (Translation mine). Hirsch, *supra* note 102 at 154.

²⁸³ “Die Bundesregierung kann die Unterrichtung über einzelne Vorgänge nur verweigern, wenn dies aus zwingenden Gründen des Nachrichtenzuganges notwendig ist.” (Translation mine). § 2 II of the *PKK Act 1992*.

²⁸⁴ Hirsch, *supra* note 102 at 68.

²⁸⁵ Germany, Deutscher Bundestag, *Berichtigung zum Gesetzesentwurf*, 12 Parl., BT-Drucksache 12/1774 (undated) [BT-Drucksache 12/1774].

²⁸⁶ Germany, Deutscher Bundestag, *Parliamentary Debates*, 12th Parl, Plenarprotokoll 12/82 (12 March 1992) at 6804 [Plenarprotokoll 12/82].

to the principle of the separation of powers. To avoid jeopardizing the 1992 legislation, this middle course was chosen.²⁸⁷

In the debate during the legislative procedure, the duties and responsibilities of the PKK were described as “twofold”. On the one hand, the duty of the PKK was defined as providing protection for the citizens against intrusions of the intelligence services; on the other hand, the PKK was considered a body that had to make sure that the intelligence services could work ‘efficiently’ and ‘under protection’.²⁸⁸ Although the MPs did also talk about the efficiency of the PKK, the parliamentarians were still convinced that the Commission should not be able to ‘oversee’ the activities of the agencies.²⁸⁹ The debate in parliament was one of the first debates on the role of the PKK since the fall of the Berlin Wall. Therefore, particularly the MPs of the PDS, a political party that had been founded in 1989 as a new left-wing party (today: Die Linke), emphasised the inefficiency of the PKK, mentioning that although several scandals had shattered public trust in the intelligence services, none of these scandals had been uncovered by the PKK since its establishment.²⁹⁰ It was further criticised that the parties who were critical of the intelligence services, the PDS and Bündnis 90/Die Grünen, had no members among the commissioners. Furthermore, it was noted that there was still no obligation to inform the public about the services’ activities and also that the government still had the right to reject the disclosure of files and information under certain circumstances.²⁹¹ Besides, a former member of the PKK described how difficult it was to control the agencies in light of the small size of the PKK, the small number of meetings and the pressure of time of the busy MPs who had several other obligations.²⁹² Nonetheless, during the legislative process, the members of the PKK stressed the importance of the agencies’ work. The chair of the PKK at that time (who was a member of the ruling party) even thanked the agencies for their work, without mentioning any scandals that had occurred.²⁹³

²⁸⁷ “[...] die Bundesregierung machte verfassungsrechtliche Bedenken aus dem Gewaltenteilungsprinzip geltend. Um aber die Gesetzesnovellierung 1992 nicht zu gefährden, wurde dieser Mittelweg gewählt.” (Translation mine). Hirsch, *supra* note 102 at 155.

²⁸⁸ Germany, Deutscher Bundestag, *Parliamentary Debates*, 12th Parl, Plenarprotokoll 12/62 (29 November 1991) at 5315 (MP Paul Laufs) [Plenarprotokoll 12/62].

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid* at 5318 (MP Andrea Lederer).

²⁹¹ *Ibid.*

²⁹² *Ibid* (MP Ralf Olderog).

²⁹³ Plenarprotokoll 12/82, *supra* note 286 at 6802 (MP Rudolf Kraus).

The fundamental reform of the PKK Act in 1999 – The PKK becomes the Parliamentary Control Panel
(Parlamentarisches Kontrollgremium, “PKGr”²⁹⁴)

In 1999, the first major reform of the PKK took place. It had its roots in a reform proposal by the SPD²⁹⁵ parliamentary group in 1998, which wanted to increase the efficiency of the parliamentary commission by merging the G10 Panel²⁹⁶ and the Commission and thus concentrating their powers.²⁹⁷ The new legislation was drafted and introduced to Parliament by all major parliamentary groups (except for the PDS).²⁹⁸ The PDS had tried to include provisions that their MPs would become members of the PKGr and that the Panel would be increased in terms of member size. The Committee on Internal Affairs of the German Bundestag rejected this proposal.²⁹⁹ The other parliamentary groups saw their support of the draft as a sign that no parliamentary partisan reasons were primarily responsible for the change of law but that all wanted to improve the control architecture.³⁰⁰ This was partly surprising since Bündnis 90/Die Grünen had introduced legislation to abolish the national security agencies in general a few years before.³⁰¹

As just mentioned, the idea came up to merge the functions of the G10 Panel and that of the PKK and to thereby form a new parliamentary control body, the so-called PKGr. The law also included new rights for that Panel.³⁰² However, since “the previous control bodies were now only to be combined under one single authority, this could not result in a new legal status for the new institution.”³⁰³ The cooperation between the new body and the parliamentary Trust Body (*Vertrauensgremium*³⁰⁴) was supposed to be strengthened, making the exchange of information easier by allowing the chairs and vice chairs of one panel to take part in the sessions of the other.³⁰⁵ For example, when the annual budget plans were discussed, the members of one panel could take part in the respective other panel’s meetings.³⁰⁶ The number of members of the PKGr was debated in Parliament as well as in the Committee on Internal Affairs. The debate was particularly heated because, as just mentioned above, the PDS wanted to be represented on

²⁹⁴ Parlamentarisches Kontrollgremium [“PKGr”].

²⁹⁵ Sozialdemokratische Partei Deutschland.

²⁹⁶ G10-Panel had five members of the Bundestag and was responsible for the parliamentary control of Art. 10 GG conflicting activities of the government. It elected the members of the G10 Commission.

²⁹⁷ Germany, Deutscher Bundestag, *Gesetzesentwurf SPD*, 13th Parl, BT-Drucksache 13/10029 (04 March 1998) [BT-Drucksache 13/10029].

²⁹⁸ Germany, Deutscher Bundestag, Innenausschuss, *Beschlußempfehlung und Bericht*, 14th Parl, BT-Drucksache 14/653 (24 March 1999) [BT-Drucksache 14/653].

²⁹⁹ *Ibid.*

³⁰⁰ Germany, Deutscher Bundestag, *Parliamentary Debate*, 14th Parl, Plenarprotokoll 14/27 (18 March 1999) at 2254 [Plenarprotokoll 14/27].

³⁰¹ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. Bündnis 90/ Die Grünen*, 12th Parl, BT-Drucksache 12/4402 (17 February 1993) [BT-Drucksache 12/4402].

³⁰² Germany, Deutscher Bundestag, *Gesetzesentwurf SPD, CDU/CSU, FDP, Bündnis 90/Die Grünen*, 14th Parl, BT-Drucksache 14/539 (16 March 1999) [BT-Drucksache 14/539].

³⁰³ “[...] bisherigen Regelungswerke unter einer Zuständigkeit zusammengefasst wurden, kann sich für die neue Kontrolleinrichtung kein neuer Rechtsstatus ergeben.” (Translation mine). Hansalek, *supra* note 14 at 131.

³⁰⁴ See above, Chapter 1, 3.) b).

³⁰⁵ BT-Drucksache 14/539, *supra* note 302 at 1.

³⁰⁶ §2e of the *Gesetz zur Änderung von Vorschriften über parlamentarische Gremien*, Federal Law Gazette I, 1999 at 1334 [PKGr Act 1999].

the Panel as well (at least partly, as some members did not want to participate because of their desire to abolish the intelligence services on the whole).³⁰⁷ Other parliamentary groups were worried about including them, also because the PDS itself was under observation of the Federal Office for the Protection of the Constitution (BfV).

In the *Act*, the Panel was assigned the right to be the recipient of the information on general and particular occurrences with regards to the intelligence services (without having to specifically ask for it). It was also allowed to ask for information concerning any other processes, if the government had the power of disposition over the information.³⁰⁸ This might not be the case if the intelligence services received the information from foreign services. For Hansalek, although this may be seen as a restriction to the control function of the Panel, this provision made sense since the Panel was only supposed to control the activities that fell into the scope of the sole “responsibility of the government”.³⁰⁹ Up to this point, the definition and scope of “general occurrences” had not really changed since 1978 (see above). But the scope of “occurrences of particular importance” remained uncertain.³¹⁰ Generally accepted is the fact that “occurrence” refers to an “isolated incident.”³¹¹ However, it is more difficult to define “of particular importance”, since the assessment of “importance” is mostly of a subjective nature. In Singer’s view, it is not only up to the government’s assessment but to the assessment of the Panel or an individual MP. Their/his/her interest “may qualify an occurrence to be of particular importance, even though it has not yet been formally articulated” by the PKGr.³¹² The government published a report on its understanding of those occurrences in 2015, which has now become part of the *PKGr Act*. In the report, three different case groups that would fall into the scope of “occurrences of particular importance” were devised: 1) “situational developments” (*Lageentwicklungen*), 2) “in-house developments or incidents” (*Behördeninterne Entwicklungen oder Vorfälle*) and 3) “individual occurrences subject to political discussions or public reporting” (*Einzelvorkommnisse, die Gegenstand politischer Diskussionen oder öffentlicher Berichterstattung sind*).³¹³

The right to request information on “other processes” helps to ensure that gaps of information can be filled. Some scholars argue that this new provision leads to a complete control of all activities of the intelligence services.³¹⁴ However, as Singer puts it, “the assumption of a full control of intelligence services by around a handful of MPs is as devious as the imagination that the German intelligence services may keep the whole society under surveillance.”³¹⁵

³⁰⁷ Germany, Deutscher Bundestag, *Parliamentary Debate*, 14th Parl, Plenarprotokoll 14/30 (25 March 1999) [Plenarprotokoll 14/30].

³⁰⁸ § 2 of the *PKGr Act 1999*.

³⁰⁹ Hansalek, *supra* note 14 at 138.

³¹⁰ Singer, *supra* note 38 at 88,89.

³¹¹ *Ibid* at 89.

³¹² *Ibid*.

³¹³ *Rules of Procedure of the PKGr*.

³¹⁴ Peitsch & Polzin, *supra* note 132 at 390.

³¹⁵ Singer, *supra* note 38 at 92.

But in light of the new technologies and possibilities, it may be doubtful whether he is right with the latter. Truly important is the fact that the MPs must have an idea of what information they are going to request; they therefore need some knowledge of or trust in rumours about processes that might be going on.

Furthermore, a new article was included in the law, codifying what so far had only been unwritten rights of the PKK. The PKGr received the right to ask for the inspection of files, to initiate hearings of the employees of the intelligence services and to make a visit at their facilities.³¹⁶ The government could only refuse to disclose information if personal rights on the part of any third party were threatened or if the information was part of the core area of executive autonomy. In case of governmental refusal to disclose information, the responsible minister—as before—had to give reasons for his decision if the PKGr asked for them.³¹⁷ With a two-third majority and after talking to the government, the PKGr could now authorise an expert to conduct certain investigations as part of their control power and then to report back to the PKGr.³¹⁸ Furthermore, for the first time, a kind of “whistleblower clause” was included:

Members of the intelligence services are permitted to approach the Parliamentary Control Panel, for official matters, but not in their own interest or in the interests of other members of these services, with petitions, when the authorities of the relevant services have not responded to those respective petitions.³¹⁹

This provision was, however, problematic insofar as it forced the members to use the official channels (the provision was later amended, see below).

The PKGr could also receive petitions of citizens to the Bundestag who were affected by the intelligence services’ activities. However, the PKGr only received them for their own knowledge and information, not in order to take direct action. Additionally, the PKGr took over the rights of the G 10 Panel. The G 10 Panel consisted of five MPs who were elected in each legislative period and who were responsible for the election of the members of the G10 Commission as well as for parliamentary and political control within the scope of Art. 10 of the *Basic Law*.

In general, this reform introduced new mechanisms for the Control Panel to inform itself without being too reliant on the government. There was, however, a scholarly debate whether those kinds of rights were in fact legitimate without a corresponding constitutional basis. The prevailing view emphasised the increasingly important role of the Parliament in executive areas for which it needed to gain information, in particular in areas where the executive had

³¹⁶ § 2a of the *PKGr Act 1999*.

³¹⁷ § 2b of the *PKGr Act 1999*.

³¹⁸ § 2c of the *PKGr Act 1999*; “In this respect, his rights (control powers and the right to administrative assistance) are not more far-reaching than those of the body itself, since his competence is derived from that of the body [...] Accordingly, the Federal Government is obliged to inform the expert to the same extent as towards the Body itself.” (Translation Mine). Singer, *supra* note 38 at 51 (“Dabei reichen seine Rechte (Kontrollbefugnisse und Recht auf Amtshilfe) nicht weiter als die des Gremiums selbst, denn seine Kompetenz ist von der des Gremiums abgeleitet. [...] Mithin ist die Bundesregierung dem Sachverständigen im gleichen Umfang zur Unterrichtung verpflichtet wie gegenüber dem Gremium selbst.”).

³¹⁹ “Angehörigen der Nachrichtendienste ist es gestattet, sich in dienstlichen Angelegenheiten, jedoch nicht im eigenen oder Interesse anderer Angehöriger dieser Behörden, mit Eingaben an das Parlamentarische Kontrollgremium zu wenden, soweit die Leitung der Dienste entsprechenden Eingaben nicht gefolgt ist.” (Translation mine). *PKGr Act 1999*.

an essential “informational advantage”.³²⁰ Nonetheless, as Peitsch and Polzin pointed out in 2000, just after the reform of 1999, the new rights were indeed controversial issues. In particular, those authors thought that the rights to listen to the employees of the agencies and to visit the locations of the agencies were adjoined to the right to control the agencies directly (instead of the government) and therefore constitutionally illegitimate.³²¹ The PKGr still did not receive any power to legally bind the government. The significance of the parliamentary control was thus still questioned.³²²

Bills 2006-2009

In the years 2006-2009, several Bills for legislative reforms of the PKGr were introduced to Parliament. In particular, the fact that the Panel was still heavily reliant on the government and the ways of a receiving of information were major points of critique. In 2008, Gusy emphasised that “the parliamentary control instances are not only blind guards, they are also guardians without swords.”³²³ One of the Bills was introduced by the SPD, CDU/CSU and FDP parliamentary groups. In its reasoning, it was mentioned how successful the PKGr was overall. It was, however, also conceded that the Panel had had its problems, which had been particularly apparent at certain instances in the Iraq war and during the fight against global terror. The Bill particularly mentioned that the control panel had not been informed regularly enough and not in depth, and furthermore, that it “is useful to further strengthen the Panel’s rights to independently obtain information, its possibilities to investigate the facts and its powers.”³²⁴ The legislation was later enacted (see below).

A second Bill was introduced by the parliamentary group of Bündnis 90/Die Grünen. This group had already submitted a proposal to the Bundestag in 2006, in which the MPs demanded more transparency for the work of the PKGr, for example through the possibility to inform the public (under certain conditions) about aspects of matters being discussed in the Panel. This should happen with the help of a right to inform the chairs of the parliamentary groups,

³²⁰ Peitsch & Polzin, *supra* note 132 at 390.

³²¹ *Ibid.*

³²² As a more general remark, the change of name from Commission to Panel took place without any legal implications. The main reason was to avoid continuing to use the same abbreviation as the *PKK*, the Kurdish Workers’ Party. The legislator also particularly aimed at making sure that the *PKK*/*PKGr* was not going to be mistaken for a “Committee” of the Bundestag. The rules of procedure that were applied to those committees should not be applied to this control commission/panel. That, for example, enabled the *PKGr* to stay much smaller than committees and to not necessarily represent all parliamentary groups of the Bundestag. (See *Haushaltskontrolle der Nachrichtendienste*, BVerfGE 70, 324 at 363 ff.; see also Singer, *supra* note 38 at 20). However, the Constitutional Court has since then characterized the Panel as a committee. (See *Stabilisierungsmechanismusgesetz*, BVerfGE 130, 318; see also Singer, *supra* note 38 at 19).

³²³ “Die parlamentarischen Kontrollinstanzen sind nicht nur blinde Wächter, sie sind auch Wächter ohne Schwert.” (Translation mine). Gusy, “Parl. Kontrolle“, *supra* note 16 at 39.

³²⁴ “[...] sinnvoll ist, die Selbstinformationsrechte, Sachaufklärungsmöglichkeiten und Befugnisse des Gremiums weiter zu stärken.” (Translation mine). Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. CDU/CSU, SPD, FDP*, 16th Parl, BT-Drucksache 16/12411 (24 March 2009) [BT-Drucksache 16/12411].

through a possibility to sanction the government and by equipping the Panel with sufficient staff.³²⁵ The motion was rejected in 2008.³²⁶ Nonetheless, the new Bill introduced by the parliamentary group of Bündnis90/Die Grünen in 2009 repeated several of those propositions.³²⁷ Another Bill was introduced by the FDP parliamentary group and in particular by MP Sabine Leutheusser-Schnarrenberger, the former minister of justice. The draft aimed at improving the acquisition of information by making it a sanctionable “disciplinary offence” (*Dienstvergehen*) if the government did not follow its obligation to report to the PKGr.³²⁸ The very last Bill was introduced by Die Linke. This reform proposal, however, was different from the others since its only purpose was to regulate the observation and surveillance of MPs by the Federal Office for the Protection of the Constitution. Die Linke wanted to introduce a provision whereby the PKGr had the right to stop that surveillance with one-fifth of the votes cast. The proposal was rejected.³²⁹ All drafts were discussed in parliament at the same time, but only the first reform proposal introduced by the SPD, CDU/CSU and FDP was accepted by the Bundestag (see below).

New Art. 45d in the Basic Law

At the same time, another Bill³³⁰ was introduced to the Bundestag by the parliamentary groups of the SPD, CDU/CSU and FDP, calling for a new article in the *Basic Law* that would formally enshrine the PKGr in the Constitution itself and thus give it a higher standing in law³³¹, with the goal of increasing the Panel’s legitimacy.³³² Die Linke rejected the legislation because it wanted the PKGr to be considered as a general committee of the Bundestag which then would have to comply with the rules of procedure of the Bundestag. Bündnis90/Die Grünen was particularly concerned since in its view a new article of the Constitution especially for the PKGr would devalue the other parliamentary committees, which have no special constitutional support.³³³

By introducing this new article to the *Basic Law*, the “constitutional legislature recognised almost incidentally the *raison d’être* of the national security agencies as the new article takes them for granted”.³³⁴ This may in particular be

³²⁵ Germany, Deutscher Bundestag, *Antrag i.a. Bündnis 90/ Die Grünen*, 16th Parl, BT-Drucksache 16/843 (08 March 2006) [BT-Drucksache 16/843].

³²⁶ Germany, Deutscher Bundestag, *Parliamentary Debates*, 16th Parl, Plenarprotokoll 16/148 (06 March 2008) at 15667 [Plenarprotokoll 16/148].

³²⁷ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. Bündnis 90/ Die Grünen*, 16th Parl, BT-Drucksache 16/12189 (04 March 2009) [BT-Drucksache 16/12189].

³²⁸ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. FDP*, 16th Parl, BT-Drucksache 16/1163 (05 April 2006) [BT-Drucksache 16/1163].

³²⁹ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. Die Linke*, 16th Parl, BT-Drucksache 16/12374 (20 March 2009) [BT-Drucksache 16/12374].

³³⁰ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. CDU/CSU, SPD, FDP*, 16th Parl, BT-Drucksache 16/12412 (23 March 2009) [BT-Drucksache 16/12412].

³³¹ Reasoning: Germany, Deutscher Bundestag, Innenausschuss, *Beschlußempfehlung und Bericht*, 16th Parl, BT-Drucksache 16/13220 (27 May 2009) [BT-Drucksache 16/13220].

³³² Singer, *supra* note 38 at 14.

³³³ BT-Drucksache 16/13220, *supra* note 331.

³³⁴ “Fast beiläufig hat der Verfassungsgesetzgeber zudem mit dem Artikel die Existenz(berechtigung) von Nachrichtendiensten anerkannt, denn er setzt die Nachrichtendienste voraus.” (Translation mine). Singer, *supra* note 38 at 14.

of importance as bills have been introduced to Parliament and several political debates have taken place in the last decades that were advocating an abolition of the national security agencies in general, not least after the disclosure of the NSU-scandal. The law to change the Constitution was supported by the necessary majority for changes to the constitution and was thus promulgated on July 22, 2009.³³⁵

b) Status Quo: Fundamental Reform of 2009 & Reform in 2016

The Reform of 2009

In what follows, the promulgated law based on the draft by the CDU/CSU, SPD and FDP parliamentary groups, aiming at a reform of the PKGr (see above), is described more closely. The PKGr was still being considered as an “auxiliary body (*Hilfsorgan*)” [*sui generis*] of the Bundestag.³³⁶ However, as Singer pointed out, this should not lead us to the assumption of any “legal consequences” being “tied” to the term “body”.³³⁷

Since the Panel’s establishment, it has been debated whether every parliamentary group of the Parliament should be represented on the Panel. Before the establishment of the Panel, the fact that one day, an extreme right-wing party might be elected to the Parliament and thus send members to a control commission was one of the main arguments against the establishment of such a commission. From the 1980s until now the debates have mostly concerned MPs from Bündnis90/Die Grünen (not of concern anymore) and Die Linke. This has particularly been the case because Die Linke has been under surveillance by the BfV itself and both Die Linke as well as Bündnis90/Die Grünen (the latter only until the beginning of the 21st century) have called for the abolishment of the intelligence services in general. However, in 2014, the chair of the Panel was—for the first time—an MP of Die Linke. Nonetheless, neither Art. 45d of the *Basic Law* nor the *PKGr Act* mandates the consideration of minority parliamentary groups. As elaborated above in the section on parliamentary control, the protection of minority rights in parliament is one of the main constitutional obligations. Therefore, the Constitutional Court decided that it would be improper to elect or not elect certain MPs just because of their party affiliation instead of electing the most capable and reliable MPs.³³⁸

There was still no statutory provision dealing with the role of the chair and his/her ‘election’. The prevailing practice was to shift between a chair of the majority and a chair of the minority parliamentary groups every year. This was, however, not constitutionally protected as a minority right.³³⁹ The reform of 2009 introduced, for the first time, the right of the Panel to authorise other members of the parliamentary groups to support them in their work for the

³³⁵ *Gesetz zur Änderung des Grundgesetzes (Artikel 45d)*, Federal Law Gazette I, 2009 at 1977.

³³⁶ BT-Drucksache 16/12412, *supra* note 330 at 5.

³³⁷ Singer, *supra* note 38 at 29.

³³⁸ Singer, *supra* note 38 at 64.

³³⁹ *Ibid* at 76.

Panel. Those supporters were not allowed to take part in the meetings of the Panel (if not specifically decided otherwise by the Panel in certain instances), but they could get access to secret information (after being formally obliged to confidentiality).³⁴⁰ Furthermore, also for the first time, the legislation included the right of the Panel to have its own employees from the Bundestag administration.

Since its establishment, the members of the PKGr have often been highly regarded members of the respective parliamentary groups, in particular because of the “significance of the Panel and the strong interest of the MPs to become members of the Panel”.³⁴¹ The workload of the MPs, who are often also members of other committees and have various responsibilities and tasks, is very high, particularly when the size of the Panel and its staff is being compared to the size of the intelligence agencies. However, as Singer points out, it might also be beneficial to the Panel to have MPs who are also members of other committees, in particular the Committee for Internal Affairs or the Defence Committee. This may “improve the level of knowledge and thus the overall control competences of the Panel”.³⁴²

In the first draft of the new *PKGr Act*, the Federal Criminal Police Office as well as the Customs Investigation Bureau were supposed to be amongst the services that were being controlled (via a control of the government) if they were active in the field of intelligence services. This new extension of the PKGr’s mandate was rejected, in particular, because the MPs were reluctant to soften the *Trennungsgebot* (separation principle regarding police and intelligence services) even further and because they also feared that this increased mandate might lead to a loss of power for the Parliament and its Committee on Internal Affairs, which were and are responsible at the moment. Singer, however, criticised these reasons, stating that, firstly, the *Trennungsgebot* did not inhibit the ambit of the PKGr, since it does not mandate separate control bodies, and, secondly, that in times of increasing cooperation and similar tasks for both intelligence agencies and the police, it might be a good idea to control them in a similar way as well.³⁴³

Due to the findings of a committee of inquiry in the sixteenth legislative period, particularly the access to information for the MPs in the Panel was improved. They were now given the right to request the handing out of certain files.³⁴⁴ Besides, the legislative also expressly included electronic data that had to be made available to the Panel.³⁴⁵ The intelligence services have to be thorough with their file keeping management. Not keeping files even to protect confidentiality would violate the rule of law principle, since it would render “a judicial review of legality of one of the constitutionally most sensitive public activities”³⁴⁶ impossible. Furthermore, beforehand, the MPs of the Panel only

³⁴⁰ § 11 of the *Gesetz zur Fortentwicklung der Parlamentarischen Kontrolle der Nachrichtendienste des Bundes*, Federal Law Gazette I, 2009 at 2346 [*PKGr Act 2009*].

³⁴¹ Singer, *supra* note 38 at 58.

³⁴² Singer, *supra* note 38 at 59.

³⁴³ Singer, *supra* note 38 at 50.

³⁴⁴ *Ibid* at 25.

³⁴⁵ § 5 I of the *PKGr Act 2009*.

³⁴⁶ Singer, *supra* note 38 at 101.

had the right to “*visit*” (*Besuchsrecht*) the intelligence services’ localities. In the new law, they gained the right to *access* any premises of the agencies.³⁴⁷ According to the prevailing opinion, a reason for the access is needed; the provision does not give the PKGr the “right to raid”³⁴⁸ the premises.

Whereas before, the members had the right to *listen* (*Anhörungsrecht*) to the employees of the agencies, the Panel now has got the right to *question* all the employees of the agencies or to ask for written information of all of them. The same applies to all members of the government and members of other federal agencies (on the condition that the Panel first informs the government about it).³⁴⁹ The informants are obliged to answer the questions thoroughly and truthfully.³⁵⁰ Against several recommendations, the powers of the PKGr are not conditioned by reference to the section about the hearing of evidence in the German Code of Criminal Procedure.³⁵¹ Singer also points out that the *PKGr Act* is also missing certain provisions about the hearing of evidence that the *Act on Parliamentary Committees of Inquiry* lays down. The legal and administrative cooperation with courts and all agencies was codified; this was necessary in order to be able to execute the questionings.

For the first time, the right to authorise an expert to carry out an investigation for the Panel was laid down, however, with a very high threshold (two-thirds majority in order to prevent the governing party from choosing someone for their purposes) for the decision to ask a specific expert.³⁵² The Panel can also decide (with a two-thirds majority) that a report about the investigation should be given to the Bundestag. The report might even include personal data if the respective person agreed or if the need for transparency and publicity was considered more important than the person’s personal rights.³⁵³ This particularity was included since the Administrative Court in Berlin had ruled that the PKGr should not publish personal data since there was no legal basis for this interference with someone’s fundamental rights.³⁵⁴ So far, there have been three major reports by experts (2004, 2005 and 2014).³⁵⁵ The provision aims mainly at reducing the workload of the Panel and making it more efficient. It can either be characterised as an “investigation instrument within the threshold of a committee of inquiry” or a “preliminary stage to a committee of inquiry.”³⁵⁶

³⁴⁷ § 5 I of the *PKGr Act 2009*.

³⁴⁸ Singer, *supra* note 38 at 103.

³⁴⁹ § 5 II of the *PKGr Act 2009*.

³⁵⁰ § 5 II of the *PKGr Act 2009*.

³⁵¹ Germany, Deutscher Bundestag, Parlamentarisches Kontrollgremium, 16th Parl, BT-Drucksache 16/7540 (12 December 2007) [BT-Drucksache 16/7540]; see Singer, *supra* note 38 at 105.

³⁵² § 7 I of the *PKGr Act 2009*.

³⁵³ § 7 III of the *PKGr Act 2009*.

³⁵⁴ AfP 2006, 397; cited in Singer, *supra* note 38 at 122.

³⁵⁵ *Ibid.*

³⁵⁶ Singer, *supra* note 38 at 131.

The Members of the intelligence agencies are furthermore now allowed to “submit petitions to the PKGr without making use of official channels”³⁵⁷. The provision was included to help the members of the intelligence agencies who were “in an ethical conflict between the obligation to secrecy and an obligation to act”.³⁵⁸ Instead of talking to the press, the member could now speak to the Panel directly. However, in 2009, there were still major limitations to the clause. The petitions still had to be given to the head of the agency (as notice), and the member was and still is not permitted to submit anything “in his/her own interest or in the interest of other members of the agencies”.³⁵⁹ Since the member’s anonymity was still not being protected, it was doubtful that such a provision would increase the Panel’s knowledge of wrongdoings by the agencies. The current version of 2016 contains the clause that “[b]ecause of the fact of the petition, they must not be officially disciplined or disadvantaged.”³⁶⁰ It is furthermore not necessary anymore to give the petition to the head of the agency. However, the Panel may still forward the name of the member to the government, if “necessary to clarify the facts.”³⁶¹

When giving its (at least) bi-annual reports, the Panel is now also asked to give information on whether the government has acted cooperatively, in particular whether it has complied with its obligation to disclose the information about special occurrences thoroughly.³⁶² In addition, if there is a two-thirds majority approval in the Panel, a member of the Panel can publish a so-called dissenting opinion on certain occurrences and is therefore exempted from the obligation to keep the information a secret from the public.³⁶³ Whenever a presentation of the facts (*Sachverhaltsdarstellung*) is necessary for the report of the Panel or the dissenting opinion, the “matters of confidentiality have to be observed”.³⁶⁴

For the first time, the legal jurisdiction of the Constitutional Court in disputes between the government and the Panel (power of filing an application needs a two-third majority of votes in the Panel) is codified in the legislation.³⁶⁵ Furthermore, from 2013 onwards, the Panel has been “making more use of the possibility of assessments according to § 10 of the Act”, which in particular “allows for *directing control*” by publishing them.³⁶⁶

The *PKGr Act* also introduced new limitations to the Panel. The restrictions to the obligation of the government to adhere to the requests of the Panel were extended to the new rights of the Panel. Thus, for example, the members

³⁵⁷ § 8 of the *PKGr Act 2009*.

³⁵⁸ Singer, *supra* note 38 at 140.

³⁵⁹ § 8 I of the *PKGr Act 2009*.

³⁶⁰ “[...] [w]egen der Tatsache der Eingabe dürfen sie nicht dienstlich gemäßregelt oder benachteiligt werden.” (Translation mine). § 8 I of the *Gesetz über die parlamentarische Kontrolle der nachrichtendienstlichen Tätigkeit des Bundes (Kontrollgremiumgesetz)*, Federal Law Gazette I, 2009 at 2346 as last amended by Article 13 of the Act of 5 January 2017, Federal Law Gazette I, 2017 at 17 [*PKGr Act 2016*].

³⁶¹ “[...] soweit dies für eine Aufklärung des Sachverhalts erforderlich ist.” (Translation mine). § 8 I of the *PKGr Act 2016*.

³⁶² § 13 of the *PKGr Act 2009*.

³⁶³ § 10 II of the *PKGr Act 2009*.

³⁶⁴ § 10 III of the *PKGr Act 2009*.

³⁶⁵ 14 of the *PKGr Act 2009*.

³⁶⁶ “Dirigierende Kontrolle.” (Translation and emphasis mine). Singer, *supra* note 38 at 34.

of the government do not have to answer if the government is not authorised to disclose the information.³⁶⁷ Furthermore, when deciding whether a process falls within the scope of the “occurrences” framework of the *PKGr Act*, the government still has the right to filter the information before disclosing it to the Panel. The “asymmetry of knowledge” therefore persists.³⁶⁸ Although the Panel does have more rights now to ask for specific data or information, it often does not know what it actually should be looking for. The questions might therefore be beside the point. Furthermore, the Panel’s members still do not have sufficient time to concentrate on the Panel’s work.³⁶⁹ Also, since the *PKGr Act* does “not know any political obligation for moderation [...] the parliamentary control often becomes an instrument of political staging.”³⁷⁰ Singer also criticised the fact that the PKGr was still not responsible for the military intelligence of the Federal Armed Forces (*Militärisches Nachrichtenwesen*, “MilNBW”). This was particularly problematic as it was uncovered in the Kunduz-Committee of Inquiry that the MilNBW was “in practice and de facto partly operating as an intelligence service by using methods and instruments that are essential for determining an intelligence activity”.³⁷¹ In general, before the enactment, the establishment of an Office for a Commissioner for the Intelligence Services was seen as the only alternative to an improved PKGr with more rights. Due to its limited democratic legitimacy, the idea was rejected (until 2016, see below).

Reform in 2016

Due to the continuing public criticism of the PKGr’s control power³⁷², as well as the problems of parliamentary control that became apparent during the NSU- as well as NSA-Committees of Inquiries, the government (CDU/CSU and SPD) introduced a new Bill to Parliament to reform the *PKGr Act* once again in July 2016, as noted briefly above. It became law (after several amendments) on November 30th, 2016.

In the commentary accompanying the Bill, the parliamentary groups emphasised that the PKGr “lacks a coordinating body, which at the same time serves as a central point of contact for the members of the Control Panel on the part of the Bundestag administration which supports them, and also implements the control objectives in a strategic sense.”³⁷³ Another problem that was determined was the low number of MPs and their lack of technical knowledge.

³⁶⁷ § 6 I of the *PKGr Act 2009*.

³⁶⁸ Jan-Hendrik Dietrich, “Reform der parlamentarischen Kontrolle der Nachrichtendienste als rechtsstaatliches Gebot und sicherheitspolitische Notwendigkeit” (2014) 7 ZRP 205 at 205.

³⁶⁹ *Ibid* at 206.

³⁷⁰ *Ibid*.

³⁷¹ “[...] die Bundeswehr in der Praxis teilweise faktisch wie ein Nachrichtendienst operiert, indem sie Methoden und Mittel einsetzt, die für nachrichtendienstliches Handeln wesensbestimmend sind.” (Translation mine).

Singer, *supra* note 38 at 50, referring to Germany, Deutscher Bundestag, Verteidigungsausschuss, *Beschlussempfehlung und Bericht*, 17th Parl, BT-Drucksache 17/7400 (25 October 2011) at 237 [BT-Drucksache 17/7400].

³⁷² Dietrich, *supra* note 368 at 207.

³⁷³ “[...] fehlt eine koordinierende Stelle, die zugleich als zentraler Ansprechpartner der Mitglieder des Kontrollgremiums auf Seiten der sie unterstützenden Bundestagsverwaltung dient und die Kontrollziele auch in strategischer Hinsicht umsetzt.” (Translation mine). Germany, Deutscher Bundestag, *Gesetzesentwurf CDU/CSU & SPD*, 18 Parl, BT-Drucksache 18/9040 (05 July 2016) [BT-Drucksache 18/9040].

Therefore, the staff of the PKGr was to be increased. Additionally, the Panel was granted the right to annually question the heads of the intelligence agencies publicly. The main proposal of the draft law was the establishment of a full-time new institution, the “Permanent Authorised Representative of the Parliamentary Control Panel” (*Ständiger Bevollmächtigter des Parlamentarischen Kontrollgremiums*) to support the PKGr in its “co-ordination with the other committees and, as its prolonged arm, to also exercise the rights of the Control Panel [...] in a strategic sense against the Federal Government and the Federal Intelligence Services”³⁷⁴ (for the final regulations on the Representative, as laid down in the Act, see below). This new authority had already been under discussion in 2009 (see above). However, the proposal had then been rejected, particularly because of the possibly emerging democratic deficit if he/she took over rights of the Panel. Those concerns (see below) are not addressed in the Bill. The Bill, furthermore, explicitly rejects the possibility of introducing a Commissioner for the Intelligence Services (*Geheimdienstbeauftragten*) who had to be elected by Parliament. The main reasons for the rejection were that the introduction of such a commissioner would contravene minority rights, that the collaboration of two bodies elected by Parliament could become difficult and that Parliament would lose some of its powers by delegating them to an “autonomous control institution”.³⁷⁵ The draft furthermore, more or less incidentally, proposed to change the rules on the chairman of the Panel: instead of switching annually, the chairman should now be elected for one legislative period, thereby making indirectly sure that he was part of the majority parliamentary group.

The parliamentary group Die Linke introduced its own Bill and moved a motion in 2015, and the parliamentary group Bündnis 90/Die Grünen moved a motion in 2016. All three got rejected. The Bill of Die Linke, however, only saw the proposed improvements as a temporary solution and still pleaded for the abolition of the security agencies in general, referring to the NSA/BND spy scandal as well as the “structural problems” of controlling the security agencies since the 80s.³⁷⁶ The Bill of Die Linke was, furthermore, not solely focussed on the PKGr but also wanted to increase the rights to information of the Committee of Defence and the Committee on Internal Affairs, irrespective of whether the PKGr was already informed about certain occurrences. It furthermore proposed a closer cooperation with the control panels of the Federal States as well as public questionings of the respective Ministers and the heads of the secret services by the PKGr at least twice a year.

The motion of the parliamentary group of Bündnis 90/Die Grünen mentioned several reasons why the *PKGr Act* needed to be fundamentally reformed: the PKGr and the G10 Commission had—once again—only heard about illegal

³⁷⁴ “Koordinierung mit den anderen Gremien unterstützen und als dessen verlängerter Arm die Rechte des Kontrollgremiums [...] gegenüber der Bundesregierung und den Nachrichtendiensten des Bundes auch in strategischer Hinsicht wahrnehmen.” (Translation mine). *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. Die Linke*, 18th Parl, BT-Drucksache 18/6640 (10 November 2015) [BT-Drucksache 18/6640]; Germany, Deutscher Bundestag, *Antrag Die Linke*, 18 Parl., BT-Drucksache 18/6645 (10 November 2015) [BT-Drucksache 18/6645].

activities by the services through the press, not by the government; the staff of the PKGr was too small; and there was a severe lack of information exchange between the different parliamentary control bodies as well as control bodies of the EU/the federal states. The necessary changes that Bündnis90/Die Grünen proposed were the following: express definitions of the occurrences and what fell into their scope (for example “co-ordinations with foreign intelligence agencies”); the right to impose sanctions if the government was unwilling to share, or only partly shared the necessary information with the PKGr by publicly reporting on it (“including a detailed description”); the introduction of sound recordings as well as a keeping of minutes of the meetings of the PKGr; the possibility “for the members of the Panel not only to evaluate the Panel’s discussions publicly, but also to report on them, if a majority of its members agrees and the security and the weal of persons or the Federal Republic are not endangered by that”; the possibility—under certain circumstances—to hold public meetings.³⁷⁷

In the legislative process and the debates on the draft of the CDU/CSU and SPD, the Opposition has particularly expressed its concern that the introduction of the office of the Permanent Authorised Representative may actually decrease the democratic legitimacy of the Panel. MP Hahn (who was formerly the first chairman of Die Linke in the PKGr) particularly emphasised his resistance: “[T]here is a serious risk that particularly sensitive acts and files will in the future be submitted to the Representative alone and not to the elected MPs. This would not support parliamentary control, but ultimately eradicate it.”³⁷⁸ Furthermore, there were worries that he or she may not “support the work of the parliamentarians but instead surrogate it.” S/he may instead be “another level that filters information” (MP Ströbele).³⁷⁹ MP Hahn furthermore particularly criticised the Bill for not allowing the members of the Panel “to get an insight into the electronic data and networks of the services—like in the Dutch model [...]”.³⁸⁰ Additionally, Hahn particularly emphasised the need to not only review but also oversee the activities of the intelligence agencies.³⁸¹

³⁷⁷ “Die Mitglieder des PKGr dürfen dessen Beratungen anders als bisher in der Öffentlichkeit nicht nur bewerten, sondern auch inhaltlich darüber berichten, sofern das PKGr dies mit Mehrheit beschließt, außer die Sicherheit oder das Wohl von Personen oder der Bundesrepublik Deutschland würden hierdurch gefährdet.” (Translation mine).

Germany, Deutscher Bundestag, *Antrag Bündnis 90/Die Grünen*, 18th Parl, BT-Drucksache 18/8163 (18 April 2016) [BT-Drucksache 18/8163].

³⁷⁸ “[...] [es] besteht die ernsthafte Gefahr, dass besonders sensible Vorgänge und Akten künftig allein dem Bevollmächtigten vorgelegt werden und nicht mehr den gewählten Abgeordneten. Damit würde die parlamentarische Kontrolle nicht unterstützt, sondern letztlich ausgehebelt”. (Translation mine).

Germany, Deutscher Bundestag, *Parliamentary Debates*, 18th Parl, Plenarprotokoll 18/184 (08 July 2016) at 18266 [Plenarprotokoll 18/184].

³⁷⁹ “[...] eine weitere Ebene, die Informationen filtert.” (Translation mine). Andre Meister, “Gesetzentwurf zur Geheimdienst-Kontrolle: Große Koalition will Massenüberwachung legalisieren und legitimieren (2 Updates)”, *netzpolitik.org* (22 June 2016), online: <<https://netzpolitik.org/2016/gesetzentwurf-zur-geheimdienst-kontrolle-grosse-koalition-will-massenueberwachung-legalisieren-und-legitimieren/>>.

³⁸⁰ “[...] die Schaffung der Möglichkeit zur Einsicht in die elektronischen Daten und Netzwerke der Dienste – nach holländischem Vorbild.” (Translation mine). *Ibid.*

³⁸¹ *Ibid.*

The new *PKGr Act* that became effective in November 2016 amended the provision on the chairman who is now being elected by the PKGr (as is the vice-chairman). The presidents of the intelligence services will be heard publicly once a year.³⁸² And the Panel will be given supplementary staff of the Bundestag administration.³⁸³ The Act's most important new feature is the position of the Permanent Representative. He/She is bound by instructions of the PKGr³⁸⁴ and conducts "regular and specific, individual investigations"³⁸⁵ on behalf of the PKGr. "The Permanent Representative shall prepare the meetings of the Parliamentary Control Panel and its reports to the plenum of the German Bundestag. He or she regularly attends the meetings of the Parliamentary Control Panel, that of the Commission under Article 10 of the Basic Law and the Trust Committee under Article 10a of the Federal Budget Regulation."³⁸⁶ In the sessions of the PKGr, the Representative reports on his/her findings to the Panel. "The Permanent Representative shall be appointed by the President of the German Bundestag for a term of five years on a proposal [of the majority of the members present] of the Parliamentary Control Panel. A reappointment is permitted once."³⁸⁷ The Representative may only work for the PKGr and is not allowed to have other commitments.³⁸⁸ Any person might be appointed as Representative "who has reached at least the age of 35, has the right to be appointed to the judicial office or to the higher non-technical administrative service, and who is authorised to deal with classified documents and is formally obliged to maintain secrecy."³⁸⁹

This part of the chapter should technically only focus on the PKGr. However, in 2016, the new reform of the PKGr was not the only change to the security architecture. Whereas the politicians of the government parliamentary groups were eager to express their support for the Parliamentary Control Panel and to stress the importance of parliamentary control, they—at the same time—introduced a new institution, i.e. a non-parliamentarian control body for the BND, to the system. The fact that the new body was established at the time when the new reform law on the PKGr was enacted makes it essential to discuss both the reform and the new body at the same time.

³⁸² § 10 *PKGr Act 2016*

³⁸³ § 12 I *PKGr Act 2016*

³⁸⁴ § 5a II *PKGr Act 2016*.

³⁸⁵ "[...] regelmäßige und einzelfallbezogene Untersuchungen." (Translation mine). § 5a I *PKGr Act 2016*.

³⁸⁶ "Die oder der Ständige Bevollmächtigte bereitet die Sitzungen des Parlamentarischen Kontrollgremiums und dessen Berichte an das Plenum des Deutschen Bundestages vor. Sie oder er nimmt regelmäßig an den Sitzungen des Parlamentarischen Kontrollgremiums, der Kommission nach dem Artikel 10-Gesetz und des Vertrauensgremiums nach § 10a der Bundeshaushaltsordnung teil." (Translation mine). § 5a IV *PKGr Act 2016*.

³⁸⁷ "Die oder der Ständige Bevollmächtigte wird auf Vorschlag [der Mehrheit der anwesenden Mitglieder] des Parlamentarischen Kontrollgremiums von der Präsidentin oder dem Präsidenten des Deutschen Bundestages für die Dauer von fünf Jahren ernannt. Einmalig ist eine Wiederernennung zulässig." (Translation mine). § 5b I *PKGr Act 2016*.

³⁸⁸ § 5b II *PKGr Act 2016*.

³⁸⁹ "Zur oder zum Ständigen Bevollmächtigten ernannt werden kann nur, wer mindestens das 35. Lebensjahr vollendet hat, die Befähigung zum Richteramt oder zum höheren nichttechnischen Verwaltungsdienst hat sowie zum Umgang mit Verschlusssachen ermächtigt und förmlich zur Geheimhaltung verpflichtet wurde." (Translation mine). § 5b II *PKGr Act 2016*.

Along with the new regulations for the BND that were described on page 10, the new BND law introduced a new control body—the so-called “Independent Body” (“*unabhängiges Gremium*”).³⁹⁰ The new body will be filled with six members: the chairman, two committee members and three deputy members, who step in if a member is prevented for any reason.³⁹¹ The six members are all either judges of the Federal High Court of Justice or Federal Public Prosecutors at the Federal High Court. Therefore, the President of the Federal High Court of Justice and the Federal Public Prosecutor General then nominate the members whom the Federal Cabinet may then appoint for six years. Therefore, the members are “independent and not subject to any instructions”.³⁹² The body is supposed to meet at least every three months and to report to the PKGr at least semi-annually.³⁹³ The Federal Chancellery has to inform the new body before the execution of any directive (or immediately after the execution in the case of imminent danger) that allows the BND to “collect and process information from within the country, including personal data from telecommunications networks, through which the telecommunications of foreigners takes place (telecommunication networks)”.³⁹⁴ It may also randomly monitor the automatic transfer of data to foreign bodies.³⁹⁵

The new body is an expression of the fact that the government is convinced that the BND does not act contrarily to Art. 10 of the *Basic Law* and that the G10 Commission is thus not competent. Wetzling comments on the new law: “In practice, it will be difficult to distinguish between bearers of German fundamental rights, EU Member States and authorities, EU citizens and the rest of the world. It will be difficult to control whether the BND is able to achieve a clean separation, in particular for an independent body, which meets less frequently than the G10 Commission, but has to legally control a significantly greater range of action.”³⁹⁶ Although the law states that the rights of the PKGr remain unaffected by the establishment of the new body, it is doubtful that a new body will increase the willingness of the agencies as well as the government to seriously cooperate with the PKGr. This helps to demonstrate the government’s strong reluctance to seriously support parliamentary control. A former judge of the Federal High Court of Justice, Nešković, raised respective concerns to *Netzpolitik.org*: “In the Parliamentary Control Panel, the governmental groups have a reliable majority, and in the ‘Independent Body’ they control who is called. This means that control

³⁹⁰ § 16 *Gesetz zur Ausland- Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*.

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*, § 16 IV, VI.

³⁹⁴ “[...] vom Inland aus mit technischen Mitteln Informationen einschließlich personenbezogener Daten aus Telekommunikationsnetzen, über die Telekommunikation von Ausländern im Ausland erfolgt (Telekommunikationsnetze), zu erheben und verarbeiten.” (Translation mine). *Ibid.*, § 6 I.

³⁹⁵ *Ibid.*, § 15 I.

³⁹⁶ “In der Praxis wird schwer zwischen deutschen Grundrechtsträgern, EU-Mitgliedstaaten und -behörden, EU-Bürgern und dem Rest der Welt unterschieden werden können. Ob dem BND die saubere Trennung gelingt, wird zudem schwer zu kontrollieren sein. Insbesondere nicht von einem unabhängigen Gremium, das seltener zusammenkommt als die G-10 Kommission, dafür aber ein bedeutend größeres Handlungsspektrum juristisch kontrollieren soll.” (Translation mine). Andre Meister, “BND-Gesetz”, *supra* note 60.

remains what it has been so far—a macabre joke.”³⁹⁷ Therefore, the reforms in 2016 not only led to changes to the Panel itself (election of the chairman, additional staff). It also and primarily introduced the Permanent Representative and, as a new control institution, the Independent Body. Before turning to the Canadian control system, it might be of interest to elaborate on the potential influence of the European Union and the European Court of Human Rights on the German system.

V. The Influence of the European Union (“EU”) and the European Court of Human Rights (“ECtHR”) on the Architecture of Parliamentary Control in Germany

A factor of the German system, compared to Canada, is the influence of the European Union (EU), the Council of Europe (CoE) and the European Court of Human Rights (ECtHR) on German legislation. The following section will give a short overview of the various influences that ‘European’ law has had on the German system. It will not give detailed information on oversight and review on the international level or by the EU itself or on related controversies on data processing and information gathering by the EU.³⁹⁸

1. Influence of the Council of Europe (“CoE”) and the European Court of Human Rights (“ECtHR”)

The next section reflects on the influence of the CoE and the ECtHR on the German national security architecture, i.e. on German reactions to the judgements of the ECtHR and the European Convention on Human Rights (“ECHR”) as well as other kinds of CoE-influences. It does not aim at giving a broad or general overview of the policy of the ECtHR and the CoE and the respective general legal system.

Several articles of the European Convention on Human Rights allow for an encroachment upon these rights if necessary in terms of national security.³⁹⁹ Additionally, as Cameron points out, “the ECtHR has held that where there is an exceptional situation threatening public order, such as a wave of terrorist violence, then this background can be taken into account in determining the legitimacy of measures that allegedly infringe ECHR rights.”⁴⁰⁰ The ECtHR has made several judgements concerning the assertion of powers of the security services, for example in *Harman and Hewitt v UK*.⁴⁰¹ In this case, the ECtHR ruled that an encroachment by the secret service upon the fundamental right

³⁹⁷ “Im Parlamentarischen Kontrollgremium haben die Regierungsfractionen eine verlässliche Mehrheit und beim ‘Unabhängigen Gremium’ haben sie es in der Hand, wer berufen wird. Damit bleibt die Kontrolle das, was sie bislang war – ein makaberer Witz.” (Translation mine). *Ibid.*

³⁹⁸ Artur Gruszczak, *Intelligence Security in the European Union- Building a Strategic Intelligence Community* (London: Palgrave Macmillan, 2016) at 252.

³⁹⁹ Art. 6, 8, 10 and 11 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 [ECHR].

⁴⁰⁰ Iain Cameron, “The European Dimension” in Zachary K. Goldman & Samuel J. Rascoff, eds, *Global Intelligence Oversight, Governing Security in the twenty-first century* (Oxford: Oxford University Press, 2016) at 77, exemplary referring to *Brogan v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A) 48 (1988).

⁴⁰¹ *Harman and Hewitt v UK* (1992) 14 E.H.R.R. 657 at 17, referred to by Hans Born & Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*. (Oslo: Publishing House of the Parliament of Norway, 2005) at 19.

to Article 8 of the Convention needed a basis in legislation. Therefore, the UK parliament passed the *Security Service Act 1989*, determining the MI 5 rights.⁴⁰² In several judgements, the ECtHR has described what kind of law was necessary in order to allow for the limitation of the fundamental rights. Born and Leigh mention several of these cases⁴⁰³ and define the ECtHR qualifications of law as a “Quality of Law Test”.⁴⁰⁴ The “Quality of Law Test” thus concerns the second step: the requirements that the necessary law must fulfil in order to constitute a permissible limitation to the fundamental rights.

In *Klass and Others v the Federal Republic of Germany*, the ECtHR “held that an individual might, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had been in fact applied to him. The relevant conditions were to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures”⁴⁰⁵, “since otherwise Article 8 runs the risk of being nullified”⁴⁰⁶.⁴⁰⁷ The Court has since limited the *Klass* Ruling (new threshold of “reasonable likelihood that the security services had compiled and retained information concerning his or her private life”) but also “in other cases [...] reiterated the *Klass and Others* approach”.⁴⁰⁸ The Court now follows the so-called “Kennedy Approach” (*Kennedy v the United Kingdom*)⁴⁰⁹.⁴¹⁰

The Court gave several rulings concerning the communications surveillance of citizens of CoE-member states with various means⁴¹¹ and on the right to life. In a very recent judgement of 2017, the Court had to deal with the complaints

⁴⁰² *Ibid.* (Born & Leigh) at 19.

⁴⁰³ *Sunday Times v. UK*, 26 April 1979, 2 EHRR 245 at para 47; *Silver and Others v. UK*, 25 Mar. 1983, 5 EHRR 347 at para 85; *Silver and Others v. UK* at paras 88-89; *Klass v. Federal Republic of Germany*, No. 5029/71, Report of 9 March 1977 at para 63. *Kruslin v. France*, 24 April 1990, A/176-A at para 35, *Huwig v. France*, 24 April 1990, A/176-B at para 34, cited in *Ibid* at 20.

⁴⁰⁴ Referred to by Born & Leigh, *supra* note 401 at 20: “In this case, the Court stated that to qualify as ‘law’ a norm must be adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct (*Sunday Times v UK*, 26 April 1979, 2 EHRR 245, para 47); [a] law which ‘allows the exercise of unrestrained discretion in individual cases will not possess the essential characteristics of foreseeability and thus will not be a law for present purposes. The scope of the discretion must be indicated with reasonable certainty.’ (*Silver and Others v UK*, 25 Mar. 1983, 5 EHRR 347, para 85); [c]hecks and other guarantees to prevent the misuse of powers by the intelligence services must be established if there is to be consistency with fundamental human rights. Safeguards must exist against abuse of the discretion established by law (*Silver and Others v UK*, para 88-89); [a]s far as these safeguards are not written in the law itself, the law must at least set up the conditions and procedures for interference (*Klass v FRG*, No. 5029/71, Report of 9 March 1977 para 63. *Kruslin v France*, 24 April 1990, A/176-A, para 35, *Huwig v France*, 24 April 1990, A/176-B, para. 34).”

⁴⁰⁵ *Roman Zakbarov v Russia* [GC], no. 47143/06, 4 December 2015 at 165 [*Roman Zakbarov*].

⁴⁰⁶ *Klass v Federal Republic of Germany*, *supra* note 403 at 36.

⁴⁰⁷ *Roman Zakbarov*, *supra* note 405 at 165.

⁴⁰⁸ *Ibid* at 166/167.

⁴⁰⁹ *Kennedy v the United Kingdom*, [2010] ECHR 26839/05, [2010] ECHR All ER (D) 224.

⁴¹⁰ “Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies”, ECtHR in *Roman Zakbarov*, *supra* note 405 at 171.

⁴¹¹ For example, *Copland v the United Kingdom*, no. 62617/00, ECHR 2007-I; *Kbmel v Russia*, no. 20383/04, 12 December 2013; *Uzun v Germany*, no. 35623/05, ECHR 2010; *S. and Marper v the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008; *Sber and*

concerning the Beslan terror attack of 2004, where “[t]he applicants argued that the Russian authorities [the intelligence services⁴¹²] had had knowledge of a real and immediate threat to life but had failed to take the reasonable preventive measures available”⁴¹³, claiming a violation of Article 2 of the Convention on Human Rights.⁴¹⁴ The judgement against Russia⁴¹⁵ clearly shows the different kind of influences the ECtHR may have on the security structure of its member states. Not only may it define thresholds for domestic laws, it also forces the member states’ governments to make sure that their intelligence services are taking the appropriate measures and steps to protect their citizens. Furthermore, in judgements concerning the extraterritorial rendition of people from member states’ territories⁴¹⁶, “[t]he Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned [Article 3 of the Convention].”⁴¹⁷ This case law may also be important considering the cooperation of western intelligence agencies with security agencies of countries that actually or allegedly torture their detainees.⁴¹⁸ Prior to the case *Al Nashiri v. Poland*, concerning the secret CIA prisons and detentions and the collaboration of the States Parties to the Convention, the Council of Europe had introduced a procedure under Art. 52 of the Convention, sending the following questionnaire to the States Parties of the Convention:

[t]he States were asked to explain how their internal law ensured the effective implementation of the Convention on four issues: 1) adequate controls over acts by foreign agents in their jurisdiction; 2) adequate safeguards to prevent, as regards any person in their jurisdiction, unacknowledged deprivation of liberty, including transport, with or without the involvement of foreign agents; 3) adequate responses (including effective investigations) to any alleged infringements of ECHR rights, notably in the context of deprivation of liberty, resulting from conduct of foreign agents; 4) whether since 1 January 2002 any public official had been involved, by action or omission, in such deprivation of liberty or transport of detainees; whether any official investigation was under way or had been completed.⁴¹⁹

The CoE was not only requesting a statement concerning these matters of the Polish government but of all governments of the states that had signed the Convention. The results were later published in an official report.⁴²⁰ As a

Others v the United Kingdom, no. 5201/11, 20 October 2015 (not final); *Weber and Saravia v. Germany* (dec.) (no. 54934/00, ECHR 2006-XI, listed in European Court of Human Rights, Research and Library Division of the ECtHR. *International and national courts confronting large-scale violations of human rights - Terrorism-*; Background paper for the seminar, Opening of the Judicial Year 2016, online: European Court of Human Rights <www.echr.coe.int/Documents/Seminar_background_paper_2016_part_2_ENG.pdf>.

⁴¹² *Ibid* at 8.

⁴¹³ *Tagayeva and Others v Russia*, ECLI:CE:ECHR:2017:0413JUD002656207 at 478.

⁴¹⁴ *Ibid*.

⁴¹⁵ The Court held inter alia that Russia had violated the positive obligation to protect the lives of the endangered people (Art. 2 ECHR) by avoiding or at least minimising the terrorist threat and taking the appropriate measures (in this case in particular since the terrorist threat was very specific).

⁴¹⁶ For example, *El-Masri v the Former Republic of Macedonia* [GC], no. 39630/09, ECHR 2012 [*El-Masri*]; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014 [*Al Nashiri*].

⁴¹⁷ *El-Masri, ibid.* at 195, referring to *Chahal v the United Kingdom*, 15 November 1996, § 79, Reports 1996-V and *Labita v Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV.

⁴¹⁸ Cf. the Arar-scandal in Canada (see below, part II of the thesis).

⁴¹⁹ *Al Nashiri, supra* note 416 at 241.

⁴²⁰ (SG/Inf (2006) 5) of 28 February 2006.

result, the Secretary General of the CoE proposed several measures to the governments of the CoE-States “to control the activities of foreign intelligence services in Europe, reviewing state immunity, and making better use of existing controls on over-flights, including requiring landing and search of civil flights engaged in state functions”. According to the Parliamentary Assembly of the CoE website, none of the proposals has so far ever been put into practice.⁴²¹

Furthermore, on the topic of the secret CIA detentions and the collaboration with several member states of the CoE as well as renditions, “[o]n 1 November 2005 the Parliamentary Assembly of the [CoE] launched an investigation into allegations of secret detention facilities being run by the CIA in many member states, for which Swiss Senator Dick Marty was appointed rapporteur.”⁴²² So far, there have been three so-called Marty Reports in 2006⁴²³, 2007⁴²⁴ and 2011⁴²⁵, all of which came to the conclusion that secret detention centres had existed in CoE-member states and that extraordinary renditions had happened. In the 2007 report, it was also referred to a German citizen who was the victim of an extraordinary rendition by the CIA to Afghanistan:

In Germany, the work of the Bundestag commission of inquiry is proceeding energetically. But the prosecutorial authorities, engaged in the hunt for the kidnappers of Khaled El-Masri, still meet with lack of co-operation on the part of the American and Macedonian authorities. Khaled El-Masri still awaits the rehabilitation and redress of damages owed to him, in the same way as Maher Arar, the victim in a comparable case in Canada.⁴²⁶

Unlike the Canadian case, the German commission of inquiry came to the conclusion—in contrast to statements of El-Masri, possible witnesses⁴²⁷ and NGOs—that no German authority had known about the incident and that there had been no intelligence collaboration either while he had been in Afghanistan.⁴²⁸ The Commission of Inquiry, which was not only concerned with the case of El-Masri, but also with the activities of the German security agencies in the war in Iraq (including two other cases of extraordinary renditions to Guantanamo Bay and Syria), was harshly criticised for its work and work results, for example by the ECCHR, the European Centre for Constitutional and Human Rights.⁴²⁹ The ECCHR heavily supported the claim that the German authorities had known about the extraordinary renditions and that there had been at least information sharing between the German authorities and foreign agencies,

⁴²¹ Council of Europe, Parliamentary Assembly of the Council of Europe, *The Council of Europe's investigation into illegal transfers and secret detentions in Europe: a chronology*, online: Parliamentary Assembly of the Council of Europe <www.assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=362>.

⁴²² *Al Nashiri*, *supra* note 416 at 244.

⁴²³ Council of Europe, Parliamentary Assembly of the Council of Europe. *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*. Doc. 10957 (12 June 2006).

⁴²⁴ Council of Europe, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights. *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Doc. 11302 rev. (11 June 2007).

⁴²⁵ Council of Europe, Parliamentary Assembly of the Council of Europe. *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*. Doc. 12714 (16 September 2011).

⁴²⁶ Council of Europe, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights. *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Doc. 11302 rev. (11 June 2007) at no 15.

⁴²⁷ For example, Peter Blechschmidt, “El-Masri-Entführung – ‚Die Botschaft war früher informiert‘“, *Süddeutsche Zeitung* (17 Mai 2010), online: <www.sueddeutsche.de/politik/el-masri-entfuhrung-die-botschaft-war-frueher-informiert-1.799355!amp>.

⁴²⁸ BT-Drucksache 16/13400, *supra* note 428 at 353.

⁴²⁹ European Center for Constitutional and Human Rights, *Folter und die Verwertung von Informationen bei der Terrorismusbekämpfung. Die Fälle Kurnaz, Zammar und el-Masri vor dem BND-Untersuchungsausschuss*, ed (Berlin: ECCHR, 2011).

thereby also relying on the statements of Marty in the commission of inquiry.⁴³⁰ It furthermore used the Canadian Arar Commission as an example of an inquiry that—unlike the German commission—“showed great sensitivity to liberal and democratic legal principles as well as a special commitment to the protection of basic human rights.”⁴³¹ In 2017, the German Federal Public Prosecutor who had “launched an examination as to whether the report raise(d) suspicions that crimes (had) been committed under the German Code of Crimes against International Law (CCAIL)”⁴³² discontinued his investigations due to the limitation period in proceedings, according to *Der Spiegel*.⁴³³

In 2011, the Marty Report furthermore proposed:

With regard to international co-operation between oversight bodies, the Assembly calls on parliaments participating in the development of the future ‘Network of European expertise relating to parliamentary oversight of security and intelligence services’ to consider widening the terms of reference of the future network and the range of participants in order to make it an effective instrument of co-operation between the competent bodies of all Council of Europe member and observer states, making it possible to remedy the shortcomings in parliamentary oversight resulting from increased international co-operation between the services in question.⁴³⁴

In 2017, the Council of Europe’s Commissioner of Human Rights, Nils Muižnieks, visited Germany for one week “to assess [its] effective respect for human rights.”⁴³⁵ The report by Muižnieks particularly emphasised the role of the BND in the mass surveillance NSA scandal and the BND’s surveillance of European partners. The CoE-Commissioner of Human Rights also criticised the current oversight/review structure in Germany. “In the Commissioner’s view, current challenges relating to effective oversight of intelligence and security services in Germany include the lack of resources and expertise, the scope of the oversight of telecommunications, problems of coordination, as well as the absence of effective remedies for persons affected by surveillance of their telecommunications.”⁴³⁶ He emphasised the “lack of resources [...] the ratio of the number of overseers to the number of those subject to oversight is especially telling: two bodies of 13 members, supported by a small secretariat, are responsible for the oversight of activities involving, for the largest agency (the BND), a staff of about 6,000.”⁴³⁷ He concluded and proposed:

The authorities should also guarantee that all oversight bodies have access to all information, regardless of its level of classification, which they deem to be relevant to the fulfilment of their mandates. Access to information by oversight bodies should be enshrined in law and supported by recourse to investigative powers and tools which ensure such access.

The question of surveillance operated by the German intelligence services over non- German citizens outside of Germany should be clarified. The Commissioner urges the authorities to ensure adherence to Article 8 of the European Convention on Human

⁴³⁰ *Ibid* at 33.

⁴³¹ *Ibid* at 47.

⁴³² Update of 7 CoE-Member States on the CIA secret detention centres and extraordinary renditions, online: [pace.net/documents/19838/2008330/AS-JUR-INF-2016-06-Table-EN.pdf/9a194df4-4c22-4ec4-b309-10c144c1dc1d](https://www.pace.net/documents/19838/2008330/AS-JUR-INF-2016-06-Table-EN.pdf/9a194df4-4c22-4ec4-b309-10c144c1dc1d).

⁴³³ “Ermittlungen gegen mutmaßlichen CIA-Agenten eingestellt”, *Der Spiegel* (08 April 2017), extract online: www.spiegel.de/politik/ausland/fall-khaled-el-masri-ermittlungen-gegen-mutmassliche-cia-agenten-eingestellt-a-1142391.html.

⁴³⁴ Council of Europe, Parliamentary Assembly of the Council of Europe, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Doc. 12714 (16 September 2011) at 4; no further information can be found on the network. Therefore, it seems as if the idea to establish it has so far not been realised by the states.

⁴³⁵ Council of Europe, Commissioner for Human Rights, *Report*, CommDH(2015)20 (01 October 2015) (Emphasis mine).

⁴³⁶ *Ibid* at no. 57.

⁴³⁷ *Ibid* at no. 58.

Rights, guaranteeing the right to private life, which should apply to all activities of the states that are party to this Convention, including all its national security and intelligence activities.⁴³⁸

The government of the Federal Republic of Germany rejected the criticism of the Human Rights Commissioner on the issue of oversight/review.⁴³⁹

The European Convention on Human Rights has—according to Art. 59 II of the *Basic Law*—the character of a federal law. Therefore, “[t]his classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government.”⁴⁴⁰ Furthermore, the Constitutional Court held that “[t]he decisions of the EC[t]HR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols. [...] It follows from [...] [Art. 46 of the Convention] that the judgments of the EC[t]HR are binding on the parties to the proceedings and thus have limited substantive res judicata.”⁴⁴¹ Even if Germany is not a party to the conflict but the ECtHR judgement is directed at another member state, the Constitutional Court concludes that

[t]he binding effect of decisions of the EC[t]HR depends on the area of competence of the state bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law (Article 20.3 of the Basic Law) by relying on a decision of the EC[t]HR. But the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the EC[t]HR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the EC[t]HR and the ‘enforcement’ of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law. [...] If there are decisions of the EC[t]HR that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the EC[t]HR when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the EC[t]HR after weighing the rights of the parties.⁴⁴²

After this judgement, the influence of the Convention as well as the judgements of the ECtHR have been even more emphasised by the Constitutional Court “[i]n a tone which showed an even higher affinity to the European Human Rights Convention.”⁴⁴³ Therefore, different requirements of the statute law for the security agencies that are displayed in the so-called “Quality of law test” have influence through the normative influence of the ECHR and ECtHR on the judgements of the Constitutional Court that are concerned with these laws. Caparini and Gruszczak therefore argue

⁴³⁸ *Ibid* at no. 74,75.

⁴³⁹ Germany, Government, *Comments on the Report of the CoE Commissioner*, online: www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Europarat_Dokumente/Bericht_Menschenrechtskommissar_Deutschland_2015_Kommentar_Bundesregierung_de.pdf.

⁴⁴⁰ *Görgülü*, BVerfGE 111, 307 [*Görgülü*].

⁴⁴¹ *Ibid* at 38.

⁴⁴² *Ibid* at 47,49.

⁴⁴³ “[...] deutlich EMRK-affinere Tonlage.” (Translation mine). Christoph Grabenwarter & Katharina Pabel, *Europäische Menschenrechtskonvention*, 5 ed. (München: C.H.Beck, 2011) at 21. For example in *EGMR-Sicherungsverwahrung*, BVerfGE 128, 326, English version online: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html [*EGMR-Sicherungsverwahrung*].

that international bodies such as the CoE and the ECtHR constitute a new⁴⁴⁴ “dimension of accountability” by “reveal[ing] secret information and launch[ing] international investigations [and] even [by] set[ting] some standards with regard to oversight and accountability.”⁴⁴⁵

2. Influence of the European Union (“EU”)

The extent to which the European Union may influence the national responsibility to provide for an adequate national security and national review mechanism is difficult to grasp in only a few paragraphs. Therefore, this paper only gives a very limited overview of the EU’s possible influence and its implications. Additionally, in any case, as Gruszczak argues, “[i]ndeed, the principle of originator control is the critical determinant of intelligence oversight in the EU, hampering efforts to strengthen the independent control and supervision of information management and intelligence sharing in the EU security fields.”⁴⁴⁶ Therefore, this paper only reflects on the influence of the EU on the national security oversight and review structure, not on any kind of EU oversight. Also, it will not elaborate on the issue of national parliaments overseeing EU agencies or collaborations, for example as set out in Art. 88 of the *Treaty of the Functioning of the European Union* (“TFEU”).

In general, as noted above, the member states of the EU kept the sole competence in the area of national security (see Art. 4 s 2 *Treaty on European Union*, “TEU”⁴⁴⁷ and Art. 72 TFEU⁴⁴⁸). One may therefore already argue that the EU’s influence on the German national security structure is rather limited. The EU does have the “competence to agree on foreign policies ‘to safeguard its values, fundamental interests, security, independence and integrity’ (Art. 21 TEU) [...] [and the shared competence] to adopt legislation in the area of police cooperation (Art. 87 TFEU) and, in relation to material criminal law, as regards organized crime and terrorism (Art. 88 TFEU).”⁴⁴⁹

There are different areas of law in which the EU had had a great impact on the German legislation and judgements by the courts, for example in the area of data protection. Firstly, EU provisions on data protection do exist. In April

⁴⁴⁴ Both authors support “the tri-dimensional accountability model”: vertical, horizontal and “international observation and supervision”, see Gruszczak, *supra* note 398 at 235-255.

⁴⁴⁵ *Ibid* at 255, referring to Hans Born & Marina Caparini, eds, *Democratic control of intelligence services: containing rogue elephants* (Aldershot: Ashgate, 2007) at 16,17.

⁴⁴⁶ *Ibid* (Gruszczak) at 264.

⁴⁴⁷ “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” Art. 4 s. 2 of the Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01 [TEU].

⁴⁴⁸ “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” Art. 72 of the Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47 [TFEU].

⁴⁴⁹ Cameron, *supra* note 400 at 72.

2016, the new “*General Data Protection Regulation*”⁴⁵⁰ as well as the *Directive (EU) 2016/680*⁴⁵¹ were adopted and entered into force in 2016. The regulation will be applied from May 2018 onwards and the directive needs to be implemented by the member states into national law by May 2018 as well. Both the regulation as well as the directive are part of the “reform of EU data protection rules” as a “robust set of rules to make sure people's right to personal data protection—recognised by Article 8 of the EU's *Charter of Fundamental Rights*—remains effective in the digital age [emphasis in the original].”⁴⁵² The reform package will provide for a harmonisation of the data protection laws in the European member states, including the statutory provision of the new so-called “right to be forgotten”, a right that the European Court of Justice had developed in 2014⁴⁵³. The regulation also includes, for example, a chapter on “transfers of personal data to third countries or international organisations” as well as a chapter on “independent supervisory authorities.”⁴⁵⁴ In Germany, a new statute law on data protection will be established.⁴⁵⁵ Here, “[i]n the interest of a homogenous development of the general data protection law, the new Federal Data Protection Act (*Bundesdatenschutzgesetz*) is to be applied, insofar as this is not regulated by that law or by sector-specific laws, also for the processing of personal data within the scope of activities of federal public authorities outside the scope of the Union law, such as data processing by the Federal Office for the Protection of the Constitution, the Federal Intelligence Service or the Military Counterintelligence Service or in the area of the Security Verification Act.”⁴⁵⁶ Thus, the EU does not only have a direct influence on German legislation in terms of the provisions of the regulation and the

⁴⁵⁰ *General Data Protection Regulation*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

⁴⁵¹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

⁴⁵² European Union, European Commission - Fact Sheet. Questions and Answers - Data protection reform (21 December 2015), online: [europa.eu/rapid/press-release MEMO-15-6385_en.pdf](http://europa.eu/rapid/press-release_MEMO-15-6385_en.pdf).

⁴⁵³ Statement in the official press release: “Finally, in response to the question whether the directive enables the data subject to request that links to web pages be removed from such a list of results on the grounds that he wishes the information appearing on those pages relating to him personally to be ‘forgotten’ after a certain time, the Court holds that, if it is found, following a request by the data subject, that the inclusion of those links in the list is, at this point in time, incompatible with the directive, the links and information in the list of results must be erased.”

Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, C-131/12 & *Kärntner Landesregierung, Michael Seitlinger, Christof Tschobl and others*, C-594/12, ECLI:EU:C:2014:31 (13 May 2014), online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf> [Google Spain].

⁴⁵⁴ *General Data Protection Regulation*, Chapter V and Chapter VI.

⁴⁵⁵ Germany, Deutscher Bundestag, *Gesetzesentwurf der Bundesregierung, Datenschutz-Anpassungs- und Umsetzungsgesetz*, 18th Parl, BT-Drucksache 18/11325 (24 February 2017) at 1 [BT-Drucksache 18/11325].

⁴⁵⁶ “Im Interesse einer homogenen Entwicklung des allgemeinen Datenschutzrechts soll das neu gefasste Bundesdatenschutzgesetz, soweit nicht dieses selbst oder bereichsspezifische Gesetze abweichende Regelungen treffen, auch für die Verarbeitung personenbezogener Daten im Rahmen von Tätigkeiten öffentlicher Stellen des Bundes Anwendung finden, die außerhalb des Anwendungsbereichs des Unionsrechts liegen, wie etwa die Datenverarbeitung durch das Bundesamt für Verfassungsschutz, den Bundesnachrichtendienst oder den Militärischen Abschirmdienst oder im Bereich des Sicherheitsüberprüfungsgesetzes.” (Translation mine). BT-Drucksache 18/11325, *supra* note 455 at 2.2.

purposes of the directive, but also indirectly, by influencing the data protection laws also in areas outside their competence.

Also, the European Court of Justice (“ECJ”) has ruled in several instances on data protection. Two instances were mentioned above, the “right to be forgotten”⁴⁵⁷ as well as the judgement on the German Data Commissioner.⁴⁵⁸ Another judgement worth mentioning is the Court’s judgement on the data retention and safe harbour provisions.⁴⁵⁹ The ECJ held that the *Data Retention Directive*⁴⁶⁰ was invalid because it violated Arts. 7 (‘Respect for private and family life’), 8 (‘Protection of personal data’) and 52 (‘Scope of guaranteed rights’- principle of proportionality) of the *Charter of Fundamental Rights of the European Union*.⁴⁶¹ Germany had not yet incorporated the Directive into national law and was thus expecting fines by the European Commission. In 2016, the ECJ ruled again on data rendition on a request of the Administrative Court of Appeal, Stockholm, Sweden and the Court of Appeal (England & Wales) (Civil Division), United Kingdom on the interpretation of EU law.⁴⁶² This time, the ECJ held:

[g]iven the seriousness of the interference in the fundamental rights concerned represented by national legislation which, for the purpose of fighting crime, provides for the retention of traffic and location data, only the objective of fighting serious crime is capable of justifying such a measure [...] Further, while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, however fundamental it may be, cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight.⁴⁶³

The ECJ therefore prohibits the “general and indiscriminate retention”⁴⁶⁴ of traffic data and location data. The current German statute law on data rendition is currently being challenged before the Constitutional Court. Heavily criticised by NGOs as well as opposition parties and the Data Commissioner⁴⁶⁵, the research services division of the Bundestag

⁴⁵⁷ *Google Spain*, *supra* note 453.

⁴⁵⁸ See above. *European Commission v. Germany*, *supra* note 94.

⁴⁵⁹ *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources; Minister for Justice, Equality and Law Reform; Commissioner of the Garda Síochána; Ireland; The Attorney General*, C-293/12, ECLI:EU:C:2014:238 (8 April 2014).

⁴⁶⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

⁴⁶¹ Charter of Fundamental Rights of the European Union, 2000/C 364/01 [*EU Charter*].

⁴⁶² “These requests for a preliminary ruling concern the interpretation of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) (‘Directive 2002/58’), read in the light of Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’).” See *Tele2 Sverige AB v Post- och telestyrelsen, and Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis*, Joined Cases C-203/15 and C-698/15, ECLI:EU:C:2016:970 (21 December 2016) at para 1 [*Tele Sverige*].

⁴⁶³ *Ibid* (*Tele Sverige*) at paras 102, 103.

⁴⁶⁴ *Ibid* at para 97.

⁴⁶⁵ Anna Biselli, “Bundesdatenschutzbeauftragte: Vorratsdatenspeicherung ist verfassungswidrig und widerspricht Urteilen von BVerfG und EuGH”, *netzpolitik.org* (09 June 2015), online: <https://netzpolitik.org/2015/bundesdatenschutzbeauftragte-vorratsdatenspeicherung-ist-verfassungswidrig-und-widerspricht-urteilen-von-bverfg-und-eugh/>.

has now come to the conclusion that the German law is incompatible with the *Charter of Fundamental Rights of the EU* as well as with the new standards established by the ECJ.⁴⁶⁶

Interesting and worthwhile noting in this small chapter on the European Union's influence is the European Parliament's Committee on Civil Liberties, Justice and Home Affairs ("LIBE"). Of particular interest are the studies that have been done in the framework of national security law in the last couple of years, for example: "Parliamentary Oversight of Security and Intelligence Agencies in the European Union" (2011)⁴⁶⁷, "Developing an EU Internal Security Strategy, Fighting Terrorism and Organised Crime" (2011)⁴⁶⁸, "The US Surveillance Programmes and Their Impact on EU Citizen's Fundamental Rights" (2013)⁴⁶⁹, "Evaluation of EU Measures to Combat Terrorism Financing" (2014)⁴⁷⁰, "National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges" (2014)⁴⁷¹, "A Quest for Accountability? EU and Member State Inquiries into the CIA Rendition and Secret Detention Programme" (2015)⁴⁷² and "The European Union's Policies on Counter-Terrorism" (2017)⁴⁷³. The studies may indeed influence the EU policies by influencing the decisions of the EU parliament; they do, however, have no direct influence on the legislation and security architectures in the member states.

Furthermore, the studies clearly aim at the EU politicians. For example, the study on parliamentary oversight was conducted by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the European Union Institute (EUI). Its aim was to "identify democratic standards and best practice as well as a proper balance between the demands of secrecy and the need for scrutiny which can be used by the European Parliament (EP) when it sets up its own oversight body."⁴⁷⁴ Thus, the authors did not seek to exert an influence on the Member States' policies. The study does, however, also refer to the oversight of the European Union Agency for Law Enforcement Cooperation ("Europol") as well as of Eurojust⁴⁷⁵ and Frontex⁴⁷⁶, not only by the EU parliament but also by the national parliaments.

⁴⁶⁶ Germany, Bundestag, Wissenschaftlicher Dienst. "Zur Vereinbarkeit des Gesetzes zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten mit dem EuGH-Urteil vom 21. Dezember 2016 zur Vorratsdatenspeicherung" (Berlin: Deutscher Bundestag, 2017), online: www.bundestag.de/blob/492116/d7f0beffe3ae7b37bd666d6b70e2cd22/pe-6-167-16-pdf-data.pdf.

⁴⁶⁷ European Union, European Parliament, Committee on Civil Liberties, Justice and Home Affairs ("LIBE"), "Parliamentary Oversight of Security and Intelligence Agencies in the European Union" (2011) [Parliamentary Oversight Study].

⁴⁶⁸ European Union, European Parliament, LIBE, "Developing an EU Internal Security Strategy, fighting terrorism and organised crime" (2011).

⁴⁶⁹ European Union, European Parliament, LIBE, "The US surveillance programmes and their impact on EU citizen's fundamental rights" (2013).

⁴⁷⁰ European Union, European Parliament, LIBE, "Evaluation of EU measures to combat terrorism financing" (2014).

⁴⁷¹ European Union, European Parliament, LIBE, "National security and secret evidence in legislation and before the courts: exploring the challenges" (2014).

⁴⁷² European Union, European Parliament, LIBE, "A quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme" (2015).

⁴⁷³ European Union, European Parliament, LIBE, "The European Union's Policies on Counter-Terrorism" (2017).

⁴⁷⁴ Parliamentary Oversight Study, *supra* note 467 at 15.

⁴⁷⁵ The European Union's Judicial Cooperation Unit.

⁴⁷⁶ European Boarder and Coast Guard Agency.

Due to the limited space, the following evaluation will only focus on the just recently updated control mechanisms for Europol. Art. 88 *TFEU* explicitly states that “[t]hese regulations [on Europol] shall also lay down the procedures for scrutiny of Europol’s activities by the European Parliament, together with national parliaments.” On May 11, 2016, the European Council and European Parliament adopted a new regulation on Europol.⁴⁷⁷ With regards to the oversight/review of Europol’s power, the regulation states: “While respecting the role of the European Parliament together with national parliaments in the scrutiny of Europol’s activities, it is necessary that Europol be a fully accountable and transparent internal organisation. To that end, in light of Article 88 *TFEU*, procedures should be established for the scrutiny of Europol’s activities by the European Parliament together with national parliaments. [...] However, the way in which national parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State.”⁴⁷⁸ Chapter VIII then sets up a “Joint Parliamentary Scrutiny Group” (“JPSG”), “established together by the national parliaments and the competent committee of the European Union.”⁴⁷⁹ Art 51 of the Regulation also refers to Article 9 of *Protocol No 1 of the Lisbon Treaty* on the role of national parliaments in the EU which states that “[t]he European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.” The new regulation also sets up a new right of the national parliaments as they shall also receive annual reports.⁴⁸⁰ In April 2017, the speakers of the member states’ parliaments came together to inter alia establish the new control body. Amongst other details, they decided that “each Parliament shall have the right to nominate up to four members of the JPSG; in the case of bicameral parliaments each Chamber shall have the right to nominate up to two members of the JPSG. The European Parliament shall have the right to nominate up to 16 members of the JPSG. [...] The JPSG shall meet twice a year.”⁴⁸¹ Even though they also decided that there might be additional meetings, for example for “matters of urgency”⁴⁸², it is doubtful that the committee can deal with the amount of information, coming from all member states, that is processed by Europol.

In Germany, after the Lisbon Treaty, the Constitution furthermore set up a few rules on the involvement of the national parliament in EU politics. Art. 23 of the *Basic Law* for example states that “[t]he Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act

⁴⁷⁷ European Parliament and the Council. Regulation (EU) 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

⁴⁷⁸ *Ibid* at recital (58).

⁴⁷⁹ *Ibid* at Art. 51.

⁴⁸⁰ *Ibid* at recital (13), Art. 7.

⁴⁸¹ National Council of the Slovak Republic, Conference of Speakers of the EU Parliaments, Bratislava, 23-24 April 2017, Conclusions of the Presidency, Annex 1.

⁴⁸² *Ibid*.

of the European Union for infringing the principle of subsidiarity” and that “[t]he Bundestag and, through the Bundesrat, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.”⁴⁸³

As for the lack of *kompetenz-kompetenz* on the EU’s side, one may quote Ian Cameron: “the EU will legislate, and adopt treaties on, areas indirectly touching intelligence accountability. However, the lack of formal EU competence in national security matters means that to a large extent it is forced to build upon the case law of the ECtHR. [...] If there is no real interest at the national level in improved oversight, which is where such oversight must be implemented in any event, then it is asking a lot of the ECtHR to disprove of the oversight solution adopted by the state, even if most impartial observers would regard the system as gravely deficient.”⁴⁸⁴

In conclusion, this chapter has described the German system of parliamentary control, its genesis and the European influence on the German model. Before turning to any kind of assessment of the German model in order to work out potential lessons for the Canadian system, the Canadian approach to parliamentary control needs to be and will be described closely in the following chapter.

⁴⁸³ Art. 23 II, III GG. English translation online: https://www.gesetze-im-internet.de/englisch_gg/.

⁴⁸⁴ Cameron, *supra* note 400 at 93.

Chapter II: Canada: The Long Path to Bill C-22. Parliamentary Control and National Security Matters between 1969 and 2017

*“Before us are issues that question the very foundations upon which our parliamentary system is built. In a system of responsible government, the fundamental right of the House of Commons to hold the government to account for its actions is an indisputable privilege and in fact an obligation.”*⁴⁸⁵ – Speaker Peter Milliken

In June 2016, the Canadian government proposed a new Bill to Parliament—*Bill C-22*.⁴⁸⁶ *Bill C-22* will establish the first Canadian National Security and Intelligence Committee of Parliament (“NSICOP”), thus, the first review committee of parliamentarians in Canada. The idea of establishing a committee is not new. Indeed, the idea has been debated publicly for roughly the last forty years—not only by academics but also in newspapers, by various public inquiries and, not least, by parliamentarians in debates over bills and in parliamentary committees. Despite the change in the political sphere, from being focussed on Soviet espionage and subversion to global terrorism and the lone wolf problem, and notwithstanding the technological developments in the last forty years and their influence on national security, the idea of establishing a committee has stood the test of time. This chapter aims at reflecting on the last four decades of discussions and the idea of legislative control of security agencies: has the idea made progress in the last forty years? What exactly were the ideas debated in the different inquiries and put into words in the different bills that did not become law? Have former ideas and recommendations been taken over or been neglected by the new *Bill C-22*?

I. Legal Concepts

In 1998, in *Reference Re Secession of Quebec*, the Supreme Court of Canada defined democracy broadly speaking as “a political system of majority rule.”⁴⁸⁷ However, there is a lot more to the concept, particularly when elaborating on the tension between democracy and transparency on the one side and secrecy needed for diplomacy, military operations and intelligence activities on the other side. As for the concept of democracy in a Westminster state, one might consider going as far back in time as the *Magna Carta* of 1215, or the *Bill of Rights* in England of 1688. For the purpose of this short overview, it is sufficient to start with the *Canadian Constitution Act of 1867*.⁴⁸⁸ Despite the

⁴⁸⁵ Canada, Parliament, *House of Commons Debates*, 40th Parl, 3rd Sess, No 34 (27 April 2010) at 2042 (Speaker Milliken).

⁴⁸⁶ Bill C-22, *An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts*, 1st Sess, 42nd Parl, 2016 (first reading 16 June 2016) [*Bill C-22*].

⁴⁸⁷ *Reference re Secession of Quebec* [1998] 2 SCR 217 at 63 [*Secession Quebec*].

⁴⁸⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

perception of Canada as a democratic state in a Westminster tradition, the notion of democracy is neither explicitly mentioned (only indirectly by referring to the UK Constitution in the preamble) nor explained in this document. Not surprisingly, the Supreme Court of Canada considered the explicit textual mentioning of the democratic principle as part of the constitutional framework of Canada to be “redundant, even silly” since it was so obvious.⁴⁸⁹ However, in 1982, when enacting the *Canadian Charter of Rights and Freedoms* (“the Charter”), the democratic rights of the citizens, notably, the right of democratic participation in elections, were codified⁴⁹⁰ as a right in section 3 and as an overarching normative source in section 1. In 1986, the Supreme Court further elaborated on the concept of democracy in *R. v Oakes*: “democratic society which I [Chief Justice Dickson] believe to embody, to name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁴⁹¹ The Supreme Court further broadened this definition of democracy in 1998, when it ruled that the notion of democracy could only stand together with both constitutionalism and the principles of the rule of law as the existence of a legal framework was necessary for any kind of legitimacy: “[The democratic institutions] must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution” and must also respect the “moral values, many of which are embedded in our constitutional structure.”⁴⁹²

The primary public institution that represents the will of the people in a representative parliamentary system is the legislature. Through fair elections and equal suffrage, parliamentarians are considered as the people’s representatives. The division of responsibilities within a state between the legislature, the executive, and the judiciary is often expressed through the application of the notion of the separation of powers. Montesquieu argued in his famous work “*De l’Esprit des Lois*” in 1748 that the separation of power between the legislative and executive was necessary in order not to restrict liberty, otherwise, despotic executive officers could legislate and enforce undemocratic legislation.⁴⁹³ Notwithstanding such long-standing republican conceptions, “under parliamentarism, the ministers, who form the government, are themselves able to exercise executive powers (...) and are accountable to Parliament for use of these powers. Thus, there is no formal separation between legislative and executive powers (...).”⁴⁹⁴ It has even been argued that the notion of the separation of powers was not applicable at all to the Canadian system,⁴⁹⁵

⁴⁸⁹ *Secession Quebec*, *supra* note 487 at 62.

⁴⁹⁰ Section 3 of the *Canadian Charter of Rights and Freedoms*, Part. I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [Charter].

⁴⁹¹ *R v Oakes* (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103 at 136.64.

⁴⁹² *Secession Quebec*, *supra* note 487 at 67.

⁴⁹³ Charles de Secondat Montesquieu, *De l’esprit des lois*, nouvelle (London: [s.n.], 1768).

⁴⁹⁴ Michel Rosenfeld & András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP Oxford, 2012) at 652.

⁴⁹⁵ Lorne Neudorf, “Declaratory Legislation: Legislatives in the Judicial Domain?” (2014) 47:1 UBritish Columbia LRev 313.

given the lack of a strict distinction between legislative and executive powers in Canada (particularly considering that the legislature can delegate its legislative rights to the executive).⁴⁹⁶ Beyond the separation of power question, it can further be noted that the foundation of the Canadian constitution is one of “parliamentary sovereignty” instead of “popular sovereignty.”⁴⁹⁷ In light of the embeddedness of Cabinet in Parliament and Cabinet’s accountability to Parliament, the Supreme Court confirmed the existence of a notion of the separation of power in Canadian constitutional law in 1985.⁴⁹⁸ It highlighted that the “actions undertaken by the executive branch usually must flow from statutory authority clearly granted and properly exercised.”⁴⁹⁹

Well as that may be, the combined legal and political reality is that the executive in Canada enjoys vast rights and powers. In majority governments, the executive can control the House of Commons, appoint Senators to the second chamber⁵⁰⁰ and appoint Judges⁵⁰¹ to the Courts.⁵⁰² For that reason, instead of the notion of the formal separation of powers and consistent with the key (indeed dominant) role of the executive despite overarching parliamentary sovereignty, “in Canada, it is more common to view responsible government as a self-standing unwritten principle of the Constitution.”⁵⁰³ It is a principle which—in Canada—dates back to the Durham Report⁵⁰⁴, which inter alia recommended that the executive should be dependent upon the “confidence of the Legislative Assembly.”⁵⁰⁵ Responsible Government therefore “require[s] that the Prime Minister and Cabinet may hold office only for so long as they can control a majority of the House of Commons”⁵⁰⁶, within which system accountability means “the obligation to render an account of, and accept responsibility for, one’s actions, both the results obtained and the means used”⁵⁰⁷, also by publicly providing the necessary access to all information that needs to be given in order to ensure for effective parliamentary scrutiny. “Thus, democratic government is limited, equal and open government,”⁵⁰⁸ by virtue of those features of Westminster democracy that makes government accountable to Parliament and, despite extensive dele-

⁴⁹⁶ John D Richard, “Separation of Powers: The Canadian Experience” (2009) 47:4 Duquesne LRev 731.

⁴⁹⁷ Murray Rankin, “National Security: Information, Accountability, and the Canadian Security Intelligence Service” (1986) 36 U Toronto LJ 249 at 254.

⁴⁹⁸ *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455 at 469, 23 DLR (4th) 122.

⁴⁹⁹ *Babcock v. Canada*, [2002] 3 S.C.R. 3 at 20.

⁵⁰⁰ The Governor in Council appoints the Senators on the given advice of the Prime Minister.

⁵⁰¹ The Governor in Council appoints the Judges on the advice of the Federal Cabinet.

⁵⁰² Oren Gross, “Cutting Down Trees: Law-Making Under the Shadow of Great Calamities” in Patrick Macklem et al, eds, *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) at 103.

⁵⁰³ Craig Forcese & Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005).

⁵⁰⁴ Lord Durham, *Report on the Affairs of British North America*, vol. 2, Sir C.P. Lucas, ed. (Oxford: Clarendon Press, 1912).

⁵⁰⁵ Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th edition (Toronto: Irwin Law, 2013) at 42.

⁵⁰⁶ *Ibid* at 495.

⁵⁰⁷ Canada, Auditor General of Canada, *Matters of Special Importance – 2004* (Ottawa: Auditor General, 2004), cited in Forcese & Freeman, *supra* note 503 at 3).

⁵⁰⁸ Leslie Green, “Loyalty, security and democracy” in Peter John Hanks et al, eds, *National security: surveillance and accountability in a democratic society* (Cowansville, Québec: Éditions Yvon Blais, 1989).

gated and de facto executive powers, that emphasises ultimate parliamentary supremacy over the executive. Furthermore, the principle of parliamentary privilege in Canada is another concept supporting parliamentary sovereignty with an attenuated separation of powers. “The purpose of privilege is to recognize Parliament’s exclusive jurisdiction to deal with complaints within its privileged sphere of activity.”⁵⁰⁹

II. National Security

“National security” is a term that is difficult to delineate. In 2004, the Privy Council Office defined it as “deal[ing] with threats that have the potential to undermine the security of the state or society.”⁵¹⁰ However, a definition that simply repeats the word ‘security’ in an attempt to define “national security” is hardly helpful. Furthermore, Canadian legislation tends to rather focus on the activities that may pose a threat to national security than on the term national security itself. The *Security of Canada Information Sharing Act* for example defines “activities that undermine the security of Canada” as “activities that undermine [...] the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada.”⁵¹¹ Therefore, one may want to go back to 1979 for some sort of starting point that would seem to be as valid now as then, when the ‘*Commission of Inquiry Concerning Certain Activities of the Royal Mounted Police*’ defined national security in its first report as “the need to preserve the territory of our country from attack [and] the need to preserve and maintain the democratic processes of government.”⁵¹²

1. Tensions

In the previous paragraph on democracy, I quoted Green who defined democratic government as being “open” and “limited”. The activities of the executive in the field of national security are, however, mostly conducted in secret, often, but not always, with good reasons: to protect its sources, gain access to subversive plans and plots, prevent terrorism and so on. The government might therefore not always be able to disclose certain information, either to the public or even within the executive itself. Effective accountability both within the executive and to the public is therefore difficult to achieve.⁵¹³ Moreover, a conflict exists not only between accountability and secrecy but also be-

⁵⁰⁹ *Canada (House of Commons) v. Vais*, 2005 SCC 30 (S.C.C.) at para 4.

⁵¹⁰ Canada, Privy Council Office, *Securing an Open Society: Canada’s National Security Policy* (Ottawa: Privy Council Office, 2004) at 3.

⁵¹¹ *Security of Canada Information Sharing Act*, SC 2015, C 20, s 2.

⁵¹² Canada, Commission of Inquiry Concerning Certain Activities of the RCMP, *Security and Information, First Report* (Ottawa, 1979) at para 38 at 15, cited in Canada, Commission of Inquiry Concerning Certain Activities of the RCMP, *Freedom and Security under the Law*, Second Report – Volume 1 (Ottawa: Supply and Services Canada, 1981) at 39,40 [*MacDonald Commission*].

⁵¹³ C.E.S. Franks, “Parliamentary Control of Security Activities Comment” (1983) 29 McGill LJ 326 at 327 (“even the respective ministers, who are held accountable for the work of the so-called national security agencies and their departments, have “limited knowledge and control over their activities” at 327).

tween security on the one hand and civil rights on the other. In the words of the Supreme Court, “these two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.”⁵¹⁴

2. Leading Canadian National Security Agencies

In Canada, several national security agencies exist, conducting different activities, *Bill C-51* mentioning 17 agencies and departments that are operating in the field of national security.⁵¹⁵ For many of these, for example the Canadian Border Services Agency or the Canadian Revenue Agency, no independent review body exists. In this chapter, due to lack of space, only three agencies, probably the best known and the ones that are currently subject to review by an independent body and therefore play a role in the general oversight and review structure of Canada, will be described in more detail.

a) Royal Canadian Mounted Police (“RCMP”)

The Royal Canadian Mounted Police is responsible for law enforcement in the field of national security. The police force describes its tasks on its website as “national security criminal investigations, protective policing, border integrity, critical infrastructure protection, marine security, air carrier protection, critical incident management and a host of related support services.”⁵¹⁶ Since the *Anti-Terrorism Act* in 2001 as well as the *Anti-Terrorism Act, 2015* (Bill C-51), the RCMP has received even wider powers in the field of national security.⁵¹⁷ Up until 1984, the RCMP was the only national security agency conducting investigations. After the RCMP had engaged in illegal activities and rights-infringing conduct⁵¹⁸, a civilian national security agency was established in 1984.⁵¹⁹

b) Canadian Security Intelligence Service (“CSIS”)

The *Canadian Security Intelligence Service Act* (“CSIS Act”)⁵²⁰ established a civilian national security agency, leaving the RCMP with law enforcement and investigation powers codified in the *Security Offences Act*.⁵²¹ The mandate of CSIS was originally the collection of intelligence. Since 1984, CSIS’ powers have drastically increased. Critics are now calling it—particularly since the enactment of *Bill C-51*—a “‘kinetic’ service, able to do things to people to ‘reduce’

⁵¹⁴ *Charkaoui v. Canada (Citizenship & Immigration)* [2007] 1 S. C. R. 350 at para 1.

⁵¹⁵ *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, SC 2015, c 20, schedule 3 [*Bill C-51*].

⁵¹⁶ Canada, Royal Canadian Mounted Police, National Security Criminal Investigations Program, online: RCMP <www.rcmp-grc.gc.ca/nsi-ecsn/index-eng.htm> .

⁵¹⁷ Explanatory Note: Particularly because of the broader scope of “terrorist activities” and new broader criminal offences.

⁵¹⁸ Explanatory Note: Particularly in the aftermath of the October crisis 1970 and the separatist movement in Quebec.

⁵¹⁹ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

⁵²⁰ *Ibid.*

⁵²¹ *Security Offences Act*, R.S.C., 1985, c. S-7.

‘disrupt’ or what used to be called ‘counter’ broadly defined security threats”.⁵²² Thus, s. 12.1 (1) of the *CSIS Act* empowers the Service to take (necessary and proportionate) measures to reduce security threats. These measures may even “contravene” rights of the *Charter* if CSIS gets a warrant granted by a judge.⁵²³

c) *Communications Security Establishment of Canada* (“CSEC” or “CSE”)

Created in 1946 for Cold War purposes, the focus of CSEC, the Canadian foreign signals intelligence agency, has shifted to anti-terrorism since 9/11. It indeed only received its first express statutory mandate through the *Anti-Terrorism Act* in 2001.⁵²⁴ In terms of ministerial responsibility, “[t]he Communications Security Establishment was transferred to the Department of National Defence for administrative purposes in 1975 through an Order-in-Council under the *Public Service Rearrangement and Transfer of Duties Act*.”⁵²⁵ CSEC has particularly been in the focus of the media and in the public eye due to the Snowden revelations in 2013 and has since then been under criticism for broad collection and analyses of meta-data, for example, data acquired from WiFi-users at Canadian airports⁵²⁶ and through mass-surveillance programs.⁵²⁷ Snowden also disclosed that CSEC had spied on Brazil’s mining and energy ministry.⁵²⁸

3. Control Mechanisms

a) *Special Bodies for the Intelligence Agencies*

RCMP Civilian Review and Complaints Commission (“CRCC”)

The RCMP was subject to review by the Commission for Public Complaints against the RCMP from 1984 to 2014, when the Commission was replaced by the RCMP Civilian Review and Complaints Commission.⁵²⁹ The Commission

⁵²² Craig Forcece & Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at 26.

⁵²³ *CSIS Act*, *supra* note 519, ss 12.1(3), 21.

⁵²⁴ Canada, Senate, *Report of the Special Senate Committee on Security and Intelligence* (Ottawa: The Senate, 1999), online: www.parl.gc.ca/Content/SEN/Committee/361/secu/rep/repsecintjan99part4-e.htm (before, “[t]he Communications Security Establishment was transferred to the Department of National Defence for administrative purposes in 1975 through an Order-in-Council under the *Public Service Rearrangement and Transfer of Duties Act*.”) [*Senate Committee 1999*].

⁵²⁵ *Ibid.*

⁵²⁶ Greg Weston; Glenn Greenwald & Ryan Gallagher, “CSEC used airport Wi-Fi to track Canadian travellers: Snowden documents”, *CBC News* (30 January 2014), online: www.cbc.ca/news/politics/csec-used-airport-wi-fi-to-track-canadian-travellers-edward-snowden-documents-1.2517881.

⁵²⁷ Jeffrey Roy, “Secrecy, Security and Digital Literacy in an Era of Meta-Data: Why the Canadian Westminster Model Falls Short” (2016) 31:1 *Intelligence & National Security* 95.

⁵²⁸ “Brazil TV report accuses Canada of spying on mining ministry”, *CBC News* (07 October 2013), online: www.cbc.ca/news/canadian-spies-targeted-brazil-s-mines-ministry-report-1.1927975.

⁵²⁹ *Enhancing RCMP Accountability Act*, SC 2013, C 18, *amending Part VI of the Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10); Canada, Civilian Review and Complaints Commission for the RCMP, Annual Report 2015-2016, online: www.cpc-cpp.gc.ca/en/annual-report-2015-2016 (in 2015-2016, the CRCC “received 1,952 public complaints regarding the conduct of RCMP members and received 241 requests to review the RCMP’s investigation of public complaints”, spending 9,7 million Dollars in total).

is an independent body that reviews the “on-duty conduct of RCMP members.”⁵³⁰ Roach and Forcese criticised the CRCC for its small budget (especially compared to the powers of the RCMP since 2015), its inability to self-initiate a review since it is bound to complaints made by the public (on all matters), its inability to closely cooperate with other review bodies, and the fact that the RCMP can refuse its request to access secret information.⁵³¹ Therefore, they concluded that they “wonder whether a body with a dominant complaints mandate and a broad subject-matter remit will ever have the resources to exercise an important but highly complicated and potentially resource intensive security review mandate.”⁵³² Furthermore, the Commission does not have the necessary access to the information needed to fulfil its review mandate⁵³³ because the RCMP “can refuse to provide [the information requested], citing the need to protect operational information and intelligence from foreign sources.”⁵³⁴

Security Intelligence Review Committee (“SIRC”)

The independent review body for CSIS’ activities is the Security Intelligence Review Committee. SIRC is firstly responsible for reviewing the activities of CSIS and is secondly also contact for complaints about CSIS. The committee consists of three to five members (one of whom is the Chair), serving for a maximum period of five years. The committee members are appointed by the Governor in Council after a consultation with the leaders of all official parties of the House of Commons (those with more than 12 parliamentarians).⁵³⁵ SIRC annually reports its findings to Parliament.

In the debate on a committee of parliamentarians, many Conservative Party MPs (for example, former Public Safety Minister Steven Blaney⁵³⁶) argued that a review committee of parliamentarians would only duplicate the work done by SIRC and complimented SIRC on the work it had done so far. However, SIRC has also been criticized due to its limited scope of review. Notably, since it is only the so-called watchdog of CSIS, it has often had difficulties reviewing national security incidents that included activities of other agencies, for example, in the handling of the Omar Khadr case⁵³⁷ or the Afghan detainee situation (to be discussed below).

⁵³⁰ Canada, Civilian Review and Complaints Commission for the RCMP, online: Civilian Review and Complaints Commission for the RCMP <www.cpc-cpp.gc.ca/>.

⁵³¹ Forcese & Roach, *supra* note 522 at 434-436.

⁵³² *Ibid* at 436

⁵³³ Kent Roach, “Review and Oversight of Intelligence in Canada, Expanding Accountability Gaps” in Zachary K. Goldman & Samuel J. Rascoff, eds, *Global Intelligence Oversight, Governing Security in the twenty-first century* (Oxford: Oxford University Press, 2016) at 177 [Roach, “Review”].

⁵³⁴ Forcese & Roach, *supra* note 522 at 435.

⁵³⁵ *CSIS Act*, *supra* note 519, s 34(1).

⁵³⁶ Michelle Zilio, “Additional oversight for security agencies just ‘needless red tape’: government”, *CTV News* (01 February 2015), online: <www.ctvnews.ca/politics/additional-oversight-for-security-agencies-just-needless-red-tape-government-1.2215610#ixzz3QVGuQlu9>.

⁵³⁷ Canada, Security Intelligence Review Committee, SIRC Study 2008-05, *CSIS’s Role in the Matter of Omar Khadr* (08 July 2009), online: SIRC <www.sirc-csars.gc.ca/opbapb/2008-05/index-eng.html>.

Despite SIRC's limited scope for review, it nevertheless does help to hold CSIS to account. Its 2014/5 concerns about CSIS' data collection prompted the Federal Court rule that the existence of the data collection since 2006 (as part of an Operational Data Analysis Center program) was unlawful as the collection was not necessary and proportionate in accordance with s. 12 of the *CSIS Act*, and particularly because the court did not know about the data collection. The court therefore concluded that the conduct constituted a breach of CSIS' "duty of candour."⁵³⁸

CSIS Office of the Inspector General (Abolished)

A second internal review body of CSIS that was put in place in 1984 was the Office of the Inspector General. The Inspector General was a kind of oversight mechanism—the Minister's eyes and ears inside CSIS—and thus enhanced ministerial responsibility. However, the position was abolished in 2012 purportedly for financial reasons and on the claim that SIRC would supposedly take over the Inspector General's responsibilities—although with an inadequate staffing level.⁵³⁹

Communications Security Establishment Commissioner

The only real review body of the CSE(C) is the Office of the CSE(C) Commissioner, who in 2007 became part of the Department of National Defence (but kept its own budget).⁵⁴⁰ The Commissioner, who is a "supernumerary judge or a retired judge of a superior court", works part-time and has quite wide powers to access information.⁵⁴¹ He is not allowed to cooperate with other review bodies such as SIRC and must not share any secret information with them (let alone with the public). The office of the Commissioner has been criticised after it commented on the Snowden revelations by stating that CSEC had not unlawfully collected metadata from Canadians.⁵⁴² It therefore argued in line with the then Prime Minister Stephen Harper who had argued that he was not "a big believer" in wide-net electronic surveillance.⁵⁴³ Beyond debates over what CSEC has or has not done, "CSEC is not subject to judicial review and (...) their practices are not based on evidentiary standards."⁵⁴⁴ Furthermore, many of the objects of investigation of the CSEC Commissioner are governed by international agreements and thus cannot be reviewed domestically for reasons of secrecy of information.

⁵³⁸ "Application for Warrants" (04 October 2016), 2016 FC 1105 Noël J at 7, online: Federal Court Canada <[cas-cdc-ww02.cas-satj.gc.ca/rss/DES%20\(warrant\)%20nov-3-2016%20public%20judgment%20FINAL%20\(ENG\).pdf](https://cas-cdc-ww02.cas-satj.gc.ca/rss/DES%20(warrant)%20nov-3-2016%20public%20judgment%20FINAL%20(ENG).pdf)>.

⁵³⁹ Forcese & Roach, *supra* note 522 at 428.

⁵⁴⁰ *Ibid.*

⁵⁴¹ S 273.63 (1) & (4) of the *National Defence Act*, R.S.C., 1985, c. N-5.

⁵⁴² Kent Roach, "Permanent Accountability Gaps and Partial Remedies" in Michael Allen Geist, ed, *Law, privacy, and surveillance in Canada in the post-Snowden era, Law, technology and media* (Ottawa: University of Ottawa Press, 2015) at 185 [Roach, "Gaps"].

⁵⁴³ "Stephen Harper says Canadians' metadata not collected", *thestar.com* (26 September 2014), online: <https://www.thestar.com/news/canada/2014/09/26/stephen_harper_says_canadians_metadata_not_collected.html>.

⁵⁴⁴ Kevin Walby & Anaïs Seantel, "Communications Security Establishment Canada (CSEC), Structures of Secrecy, and Ministerial Authorization after September 11" (2012) 27:3 Can JL & Society 363 at 364.

b) Other (Executive) Control Mechanisms

Ministerial Supervision

In theory, the respective ministers oversee the activities of the national security agencies and their departments (ministerial responsibility). However, weak points of ministerial responsibility have become known, for example in 2016, when CSIS claimed to have informed the Minister of Public Safety in 2006 and 2010 about its unlawful collection of meta-data.⁵⁴⁵ Furthermore, it seems almost impossible for any minister in current times to stay informed about all activities of his/her department and the respective agencies while at the same time having the necessary knowledge and expertise to act upon given information. In addition, certain agencies are part of the department of the Minister of Public Safety (e.g. the RCMP and CSIS) while others are part of other departments (e.g. CSEC as part of the department of the Minister of National Defence). The different ministers therefore constantly have to coordinate their actions and to collaborate in order to understand the big picture. It might also be considered as problematic that ministers, theoretically accountable to parliament, are in practice mostly dependent on the favour of the Prime Minister. Of course, the abolition of the Inspector General only exacerbates the problem with regard to CSIS. As for the RCMP, any kind of ministerial responsibility is seen as problematic due to the need for independence of the police from politics, leaving the RCMP “untouched by any reform to their almost non-existent accountability”.⁵⁴⁶ While CSEC is indeed dependent upon ministerial authorisations from the Minister of National Defence⁵⁴⁷, “ministerial authorizations are general, relating to a class of activities rather than to specific individuals or targets”.⁵⁴⁸ Furthermore, “[u]nder Ministerial Authorization, reviews of CSEC work do not happen until after the authorization has ended.”⁵⁴⁹

The Prime Minister's National Security Advisor (Privy Council Office)

The Prime Minister's National Security Advisor is responsible for advising the Prime Minister in the field of national security. His mandate has often been part of the debates in inquiries, particularly calling for its expansion to oversee the cooperation between and the co-ordination of the work of the different national security agencies and different departments of government.⁵⁵⁰

⁵⁴⁵ Colin Freeze, “CSIS claims it has been transparent with ministers about data collection”, *The Globe and Mail* (06 November 2016), online: <www.theglobeandmail.com/news/national/csis-claims-it-has-been-transparent-with-ministers-about-data-collection/article32695127/>.

⁵⁴⁶ Reg Whitaker; Gregory S. Kealy & Andrew Parnaby, *Secret Service, Political Policing in Canada from the Fenians to Fortress America* (Toronto: University of Toronto Press, 2012) at 364.

⁵⁴⁷ Explanatory Note: Particularly for the interception of private communications.

⁵⁴⁸ Forcese & Roach, *supra* note 522 at 135.

⁵⁴⁹ Walby & Anais, *supra* note 544 at 377.

⁵⁵⁰ Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Tragedy, Volume 1* (Ottawa: Public Works, 2010) at 193 [*Air India Commission*]; Canada, Senate, *Interim Report of the Special Committee of the Senate on Anti-terrorism, Security, Freedom and the Complex Terrorist Threat: Positive Steps Ahead* (Ottawa: The Senate, 2011) at 47, online: <www.parl.gc.ca/Content/SEN/Committee/403/anti/rep/rep03mar11-e.pdf>, cited in Forcese & Roach, *supra* note 522 at 374.

Privacy Commissioner (Officer of Parliament)

The Privacy Commissioner's responsibility is limited to "personal information handling and issues related to privacy."⁵⁵¹ Additionally, particularly since the increase of powers of the agencies in *Bill C-51*, the workload of the Privacy Commissioner has expanded immensely. The new information-sharing powers of "more than 100 federal agencies" allow the "information sharing for every imaginable security threat, whenever an agency deems it relevant."⁵⁵² Therefore, an effective review of the privacy impacts of the information-sharing activities of the agencies and departments will probably prove unworkable in practice.

Office of the Auditor General

The Office of the Auditor General audits all government departments and agencies⁵⁵³ and is like the Privacy Commissioner an "Officer of Parliament". Since the "Office of the Auditor General of Canada serves Parliament by providing it with objective, fact-based information and expert advice on government programs and activities, gathered through audits"⁵⁵⁴, the Office may—similarly to the Office of the Privacy Commissioner—also be considered as part of the parliamentary control structure of Canada. Irrespective of this classification, the office does not have the staff nor the budget to oversee all national security activities in detail. The Auditor General has, however, issued several reports in the realm of national security, for example, a report on "Intelligence and Information Sharing" in March 2009.

Ad hoc Commissions of Inquiry

A commission of inquiry may be "established by the Governor in Council [Cabinet] to fully and impartially investigate issues of national importance"⁵⁵⁵ under the *Inquiries Act*. Several different public inquiries investigating issues of national security have discussed the idea of creating a national security committee of parliamentarians/parliamentary committee over the years; they will be listed and discussed below. Former Supreme Court Justice Frank Iacobucci (who headed up one such inquiry) assessed inquiries themselves as yet another effective democratic accountability mechanism⁵⁵⁶. As a counterpoint, one might also interpret some inquiries as a last governmental stopgap measure to gain back some control over its "own" national security agencies.⁵⁵⁷

⁵⁵¹ Forcese & Roach, *supra* note 522 at 438.

⁵⁵² Craig Forcese & Kent Roach, "Red, yellow lights for security measures, *The Globe and Mail* (30 January 2015), online: www.theglobeandmail.com/opinion/red-yellow-lights-for-security-measures/article22728620/.

⁵⁵³ Canada, Office of the Auditor General, online: Auditor General www.oag-bvg.gc.ca/internet/English/au fs e 370.html#AG_Canada.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Canada, Privy Council Office, online: Privy Council Office www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=commissions&doc=about-sujet-eng.htm.

⁵⁵⁶ Frank Iacobucci, "Canada's Response to Terrorism" (2010) 15:2 *Rev Constitutional Studies* 187 (he argued that "[d]emocratic values are also evident in the Canadian government's willingness to be openly accountable for the actions of the executive. [Additionally,] [t]his record of accountability is very rare among democratic states" at 191).

⁵⁵⁷ Roy, *supra* note 527 ("[i]t was widely speculated, for instance, that one reason for Prime Minister Martin's decision to call a public inquiry over the Maher Arar affair stemmed from his inability to garner sufficient information from the RCMP" at 102).

c) *Parliamentary Control Mechanisms*

Question Period⁵⁵⁸ in parliament also provides for some kind of accountability—theoretically. In practice, it is difficult to ensure additional accountability if the ministers are not well-informed or are schooled in giving ‘non-answers’. Furthermore, the questions asked often refer to the current foci of the media⁵⁵⁹, leading Rempel to conclude that “as an oversight tool with respect to any issue that might be considered ‘routine’ or ‘mundane’, including most budgetary issues, it is largely ineffective.”⁵⁶⁰ There is also the possibility to ask the minister written questions (known formally as Order Paper Questions), which must be answered within 45 days.⁵⁶¹ The House of Commons Standing Committee on Public Safety and the Senate Committee on National Security and Defence also deal with issues of national security. However, they may not be seen as adequate review bodies due to their broad mandate, heavy workload and strict party discipline. As well, although committees of Parliament have the right to question witnesses, their members have partially “been denied the [...] access of information that is needed to ask the right questions of security officials.”⁵⁶² The same problem may occur in special committees of the House of Commons, the Senate or both Houses that may be established to explicitly deal with issues of national security. Another way to hold government to account is the possibility of the legislative to hold a so-called “vote of confidence”, an instrument that is, however, an exception as it comes with it either the triggering of an election or a change of government within the current Parliament. A final way is to hold the government or the head of government (the Prime Minister) in contempt of parliament for refusing to produce uncensored information to a parliamentary committee inquiring into a national security matter. This is what happened in 2010 in the Afghan detainee situation that I will describe more closely in the following part on the views of parliamentary control in Canada and the correlating debates on the establishment of a parliamentary control body in roughly the last four decades.

III. Parliamentary Control and National Security

1. (Parliamentary) Control in Theory

Before turning to the history of the idea of legislative control of security agencies it is important to mention the two modes by which accountability mechanisms operate in Canada, whether we are talking about parliamentary control or also the various extra-parliamentary control bodies and mechanisms mentioned above. Whereas in Canadian na-

⁵⁵⁸ Canadian Parliament, *Standing Orders* 37.

⁵⁵⁹ Roy Rempel, “Canada’s Parliamentary Oversight of Security and Intelligence” (2004) 17:4 *Intl J Intelligence & CounterIntelligence* 634 at 641, 642.

⁵⁶⁰ *Ibid* at 641.

⁵⁶¹ Canadian Parliament, *Standing Orders* 38.

⁵⁶² Forcese & Roach, *supra* note 522 at 406; *Senate Committee 1999*, *supra* note 524.

tional security terminology, “review” refers to an ex-post examination of the activities of an executive body, “oversight” on the other hand means the examination of ongoing activities—therefore also “the power to issue directions, influencing conduct before it occurs.”⁵⁶³ With respect to parliamentary control (whether in an oversight or review mode), Franks mentions the following principles: “[...] that administrative activities are conducted under the authority of, and within the limits of the law; [...] [and] [...] that parliamentary scrutiny is conducted in public, and publicity is the effective sanction over the executive.”⁵⁶⁴

2. The new National Security and Intelligence Committee of Parliamentarians (“NSICOP” or “the Committee”)

As mentioned above, in June 2016, the Liberal government proposed *Bill C-22*, a law that establishes Canada’s first National Security Committee of Parliamentarians, which became law in June 2017. Before turning to *Bill C-22* in its final form, this chapter will provide a short overview of the last 40 years in which the establishment of some sort of a committee of parliamentarians or parliamentary committee to conduct review (and/or oversight) of the Canadian security agencies has been debated. Thereby, the ideas behind *Bill C-22* are not only integrated into the history of the idea of parliamentary control of the security agencies but the reader may also evaluate its provisions by comparing them to different ideas discussed in different situations and instances in the past. Another way of thinking about the relevance of historical discussions is in terms of the following question: could the NSICOP have dealt with the scandals and events that prompted debates in the past?

a) Historical Overview

MacKenzie Commission, 1969

The first inquiry to discuss the establishment of a committee of parliamentarians was *the Royal Commission on Security* (“MacKenzie Commission”), which published its report in 1969.⁵⁶⁵ The inquiry was conducted without “public hearings but relied almost entirely upon the RCMP for its information and its interpretation of security issues”.⁵⁶⁶ Nonetheless, besides recommending the establishment of a civilian security agency⁵⁶⁷, the Commission did discuss the option of creating a Committee of Parliamentarians because of the “concern of Parliament and the public in the general area of security [...] [and] to provide some public reassurance that the activities and operations of the Security Service [then RCMP] are not immune from responsible scrutiny apart from that exercised by the government of the day.”⁵⁶⁸ The commissioners, however, concluded that parliament should not “be directly involved in these

⁵⁶³ Forcese & Roach, *supra* note 522 at 362.

⁵⁶⁴ Franks, *supra* note 513 at 327.

⁵⁶⁵ Canada, *Report of the Royal Commission on Security* (Abridged) (Ottawa, 1969) [*MacKenzie Commission*].

⁵⁶⁶ Whitaker, Kealy & Parnaby, *supra* note 546 at 265.

⁵⁶⁷ *MacKenzie Commission*, *supra* note 565 at 21.

⁵⁶⁸ *Ibid* at 24.

executive matters” including because it would be problematic to subject parliamentarians to security clearances.⁵⁶⁹ Interestingly enough, the Commission therefore was a strong proponent of the notion of the separation of powers in the realm of security (at a time when the Supreme Court had not yet ruled on the existence or scope of this concept in Canada⁵⁷⁰).⁵⁷¹

MacDonald Commission, 1979

The Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police (“*MacDonald Commission*”) focussed on illegalities of the RCMP. In its second report, the Commission recommended the establishment of a Joint Parliamentary Committee on Security and Intelligence.⁵⁷² Furthermore, it emphasised that a smaller committee than the Standing Committee on Justice and Legal Affairs of the House of Commons would provide for a better and more time-effective possibility to review the activities of the relevant ‘agencies’. The Commissioners also discussed the fear of partisan parliamentarians. They agreed with the findings of the *MacKenzie Commission* that one should not oblige the parliamentarians to undergo security clearances; instead, they argued that it was sufficient to consult the security agency before the appointment of parliamentarians to the committee which should then report its concerns to the respective party leader, who would then, one assumes, be expected not to appoint parliamentarians about whom the security agency had concerns. Additionally, briefings and the necessity to take an oath could be considered.

The members of the committee would be selected by their respective party leaders who themselves would possibly become members of the committee. All parties that were in the House of Commons (and were not planning to overthrow the political system) would be proportionately represented in the committee. Additionally, a member of the opposition would be the chair of the committee. All in all, not more than ten members would be on the committee, in order to ensure an effective in-depth review process. The committee itself would be renewed after each legislative period of Parliament to prevent too close links between the parliamentarians and the agencies.

The committee would receive annual reports by the Solicitor General and be allowed to question him once a year, particularly about the spending of funds (*in camera*).⁵⁷³ The committee would also be responsible for reviewing whether the agencies had “fulfill[ed] the intentions of Parliament as set out in the organization’s legislative charter”.⁵⁷⁴ Also, the exercise of extraordinary powers and the possibility of illegal activities of the (recommended new civilian) agency should be reviewed by the committee. Therefore, the committee should receive at least one annual report by

⁵⁶⁹ *Ibid* at 24.

⁵⁷⁰ *Fraser v. Public Service Staff Relations Board*, *supra* note 498.

⁵⁷¹ Whitaker, Kealy & Parnaby, *supra* note 546 (the result of the widely ignored Commission was the appointment of a civilian director of the security service of the RCMP instead of the recommended civilian agency). For the RCMP, see II 2.

⁵⁷² Explanatory Note: The inclusion of Senators was intended to provide for more knowledge and expertise (*MacDonald Commission*, *supra* note 512 Part VIII at 897).

⁵⁷³ *Ibid* at 896-905.

⁵⁷⁴ *Ibid* at 898.

the Auditor General, particularly also including possible problems of the agency with its legislative mandate. Furthermore, the committee should not only review the activities of one civilian agency but of all federal agencies involved in security since otherwise a circumvention of the review might be possible. The *MacDonald Commission* hoped that further commissions of inquiry would not be necessary due to these powers of the new proposed committee.

Some further recommended features merit mention. If secret information had to be revealed, the committee would meet *in camera*. One of the remedies of the committee would be the possibility to speak out publicly (without disclosing secret information) if it had pointed to problems and the government had nonetheless not taken the necessary actions. Also, it would report annually about the *in camera* sessions by publishing an edited version of the logs of the meetings. In short, the committee would “be concerned with both the effectiveness and the propriety of Canada’s security and intelligence arrangements”.⁵⁷⁵ However, the mandate did not include the power to address issues on the committee’s own initiative. “Matter[s] relating to security and intelligence” could also be “referred to it by [either] the Senate or the House of Commons.”⁵⁷⁶ As with the *MacKenzie Commission*, the report was not discussed in parliament.⁵⁷⁷

Five years later, a civilian agency was established in 1984 by *Bill C-157*—CSIS governed by the *CSIS Act*.⁵⁷⁸ However, no committee was created. The enactment was preceded by a special Senate committee’s debate on the proposed *Bill C-157*.⁵⁷⁹ Despite some desires of the special Committee to strengthen accountability, for example, ministerial responsibility, it nevertheless rejected the establishment of a parliamentary committee, arguing that the work of SIRC would be duplicated and that a committee would “be subject to the vagaries of time, changes in membership and overwork [as well as] [...] problems in maintaining the security of information both because of partisan motivations of its members, and because there was a ‘general question of whether that type of committee can maintain the requisite confidentiality by reason of the nature of its proceedings’.”⁵⁸⁰

Special Senate Committees, 1999 & 2011

Apart from the Air India bomb explosions, which will be discussed below, the time at the end of the Cold War and during the 1990s was “[a] formless era without a clearly defined adversary did not imply an era of security”.⁵⁸¹

⁵⁷⁵ *Ibid* at 904.

⁵⁷⁶ *Ibid* at 905.

⁵⁷⁷ Whitaker, Kealy & Parnaby, *supra* note 546.

⁵⁷⁸ *CSIS Act*, *supra* note 519.

⁵⁷⁹ Canada, Senate, Report of the Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate balance: a security intelligence service in a democratic society* (Ottawa: The Senate, 1983) [*Pitfield Committee*].

⁵⁸⁰ *Ibid* at 100, cited in Franks, *supra* note 513 at 337.

⁵⁸¹ Whitaker, Kealy & Parnaby, *supra* note 546 at 371.

In 1999, a Special Senate Committee on Security and Intelligence discussed threats to Canadian security and the government's responses to Senate committee reports of 1987 and 1989.⁵⁸² It also again discussed the potential of a parliamentary control committee. The senators, however, did not recommend the creation of a permanent parliamentary committee as a special purpose body to review or oversee the Canadian Security Intelligence Service [or CSEC]" because of once again the probable duplication of the work of SIRC, this time also mentioning that it might be "counter-productive [...] to subject the Canadian Security Intelligence Service and the Communications Security Establishment to another layer of review or a process of continuous review."⁵⁸³ Instead, they recommended a parliamentary committee to conduct reviews of all actors in the national security field⁵⁸⁴, including the other review bodies. That committee would not review specific agencies but practise a general and broad review and take the form of a standing Senate Committee.⁵⁸⁵ This committee was therefore not intended to be similar to the one the *MacDonald Commission* had proposed or the one *Bill C-22* establishes but was intended to be a standard Senate committee conducting an encompassing review mandate. A standing Senate Committee on National Security and Defence was indeed established in 2002⁵⁸⁶ but it has no extra legislative underpinnings beyond the governing law and rules for all Senate committees.

In 2001, the *Anti-Terrorism Act*⁵⁸⁷ ("ATA") was passed due to the terrorist attacks in New York City on 9/11, "creat[ing] measures to deter, disable, identify, prosecute, convict and punish terrorist groups and to prevent and punish the financing, preparation, facilitation and commission of acts of terrorism. It also provided law enforcement agencies with new preventive and investigative tools and established stronger laws against hate crimes and propaganda."⁵⁸⁸ Before its enactment, a special Senate Committee conducted a report on the legislation.⁵⁸⁹ While again, not proposing a review committee, it called, inter alia, for the appointment of an Officer of Parliament who should "monitor, as

⁵⁸² Explanatory Note: The Special Senate Committees on Security and Intelligence in 1987 and 1989 did not discuss the creation of a Committee of Parliamentarians.

⁵⁸³ Senate Committee 1999, *supra* note 524.

⁵⁸⁴ "In particular, the proposed committee should normally conduct broad scope review of the entire community, rather than specific reviews of individual organizations. In this regard it would be particularly useful for the proposed committee to focus on policies, issues or initiatives that affect the security and intelligence community as a whole and have not been examined by another parliamentary committee." *Ibid*, Chapter IV.

⁵⁸⁵ *Ibid*.

⁵⁸⁶ Canada, The Senate, Standing Committee on Security and National Defence, online: The Senate <<https://sencanada.ca/en/Committees/secd/Contact/42-1>>.

⁵⁸⁷ *Anti-Terrorism Act*, SC 2001, c41.

⁵⁸⁸ Canada, Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *A new Review Mechanism for the RCMP's National Security Activities*, Policy Report (Ottawa: Public Works, 2006) at 5 [*Arar Commission*].

⁵⁸⁹ Canada, Senate, Special Committee of the Senate, *Bill C-36* (Ottawa: The Senate, 2001).

appropriate, the exercise of powers provided in the bill. This officer should table a report annually, or more frequently, as appropriate, in both Houses.”⁵⁹⁰ No such Officer of Parliament—nor any other new control mechanism—was established by the subsequent ATA 2001.

Paul Martin Government Plan and Interim Committee of Parliamentarians

In February 2004, the Liberal government of Paul Martin published the “Action Plan for Democratic Reform”, including the idea to create a National Security Committee of Parliamentarians.⁵⁹¹ From May 2004 to October 2004, a joint Interim Committee of Parliamentarians on National Security discussed how an effective National Security Committee might look. After having familiarised themselves with British, American and Australian models of parliamentary control, the committee identified three alternative “structures” as to how the Canadian approach to parliamentary scrutiny might look.⁵⁹² The one chosen in a ballot by the members of the Interim Committee as the preferable option included the creation of a so-called “innovative joint committee of Parliament”⁵⁹³—one with co-Chairs and co-Vice Chairs like a traditional joint committee but with equal representation of members from the House of Commons and the Senate⁵⁹⁴, thereby avoiding partisan efforts and guaranteeing more consistency and commitment.⁵⁹⁵ The members of the committee would have the same privileges as in the regular plenary meetings of Parliament. The Prime Minister would appoint the members for one legislative period, but talk to the leader of the opposition before appointing members of the opposition. The members would fill the “leadership positions” of the committee by secret ballot.⁵⁹⁶ In addition, the committee would have the right to initiate an “inquiry into any particular activity or incident within its purview”.⁵⁹⁷ The already existing review bodies would continue their work but report to the committee. Furthermore, the committee should have the same right to get access to information as SIRC and the (now abolished) Inspector General of CSIS. The members would “swear an oath of secrecy”, whereas the staff would need to get security clearance. The reports of the committee to Parliament would have to be presented to the government beforehand and the government would have the right to “black out” sensitive information due to secrecy necessities.⁵⁹⁸ Nonetheless, the proposals “made little headway due to a series of elections and changes in government since

⁵⁹⁰ *Ibid.*

⁵⁹¹ Canada, Government of Canada, *Ethics, Responsibility, Accountability – An Action Plan for Democratic Reform* (Ottawa: Privy Council, 2004) at 6, online: www.pco-bcp.gc.ca/docs/information/publications/aarchives/dr-rd/docs/dr-rd-eng.pdf.

⁵⁹² Explanatory Note: Structure one: Two permanent committees, one in the House of Commons and one in the Senate. Structure two: Joint committee of Parliament with proportionate membership from both chambers and all parties.

⁵⁹³ Note: The budget should be around 3 million dollars, more than the SIRC budget at that time as the new committee would be reviewing not only one agency but review in an overarching manner – covering all agencies, departments etc.

⁵⁹⁴ Canada, Report of the Interim Committee of Parliamentarians on National Security (Ottawa: 2004) at 7, online: www.pco-bcp.gc.ca/docs/information/publications/aarchives/cpns-cpsn/cpns-cpsn-eng.pdf [Interim Committee 2004].

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid* at 8.

⁵⁹⁷ *Ibid* at 13.

⁵⁹⁸ *Ibid* at 15.

2004”.⁵⁹⁹ *Bill C-81* proposing a national security committee was tabled by the Martin government but did not become law, and will be discussed below.⁶⁰⁰

Arar Commission

The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (“*Arar Commission*”) was the next inquiry set up by the government (Martin) to investigate the activities and possible wrongdoings of officials of national security agencies. Maher Arar, a Canadian citizen, had been kidnapped by the American authorities, rendered to Jordan and then on to Syria, and imprisoned and tortured in Syria with RCMP and CSIS collaborating or at least not interfering. A commission of inquiry was established by the government. As Whitaker pointed out, “[t]he need for a special inquiry in the first place was necessitated by the manifest incapacity of the existing accountability architecture to cope with the issues raised by the Arar affair.”⁶⁰¹ Therefore, the head of the commission, Dennis O’Connor, not only investigated the incident in itself but also reviewed the structure of the accountability mechanisms in a second report in 2006, including the draft of several recommendations for the national security architecture. “[U]nfortunately, almost none of his recommendations have been acted upon.”⁶⁰²

Nonetheless, O’Connor did not escape criticism. Whitaker, firstly, criticised O’Connor for not elaborating on the “potential role of Parliament, claiming that this fell outside his terms of reference. [Secondly,] his reform proposals focussed exclusively on the traditional emphasis of national security review in Canada, issues of propriety, while ignoring issues of efficacy. [...] Efficacy issues can benefit as much from external scrutiny as propriety issues can.”⁶⁰³ Roy stated in 2016: “O’Connor’s decision to not address the issue of more direct forms of political oversight via a Parliamentary Committee further entrenches the secrecy that pervades the workings of critically important portions of our public sector.”⁶⁰⁴ O’Connor himself believed, however, that a parliamentary committee might be established in the near future: “In five years’ time, [...] a national security committee of parliamentarians may have been established.”⁶⁰⁵ Furthermore, he thought that Parliament would then be focussed on efficacy review: “I recognize that a committee of parliamentarians [...] might be concerned more with the efficacy of these activities than their propriety.”⁶⁰⁶

⁵⁹⁹ Jez Littlewood, “Accountability of the Canadian Security and Intelligence Community post 9/11: Still a Long and Winding Road?” in Daniel Baldino, ed, *Democratic oversight of intelligence services* (Annandale, NSW: Federation Press, 2010) at 90.

⁶⁰⁰ Background Information: Some significant changes made under the Martin government were the creation of the Public Safety and Emergency Preparedness Canada that replaced the former Solicitor General and the establishment of the Office of the National Security Advisor to the Prime Minister.

⁶⁰¹ Reg Whitaker, “The Post-9/11 National Security Regime in Canada: Strengthening Security, Diminishing Accountability” (2012) 16:2 *Rev Constitutional Studies* 139 at 146 [Whitaker, “Post-9/11”].

⁶⁰² Roy, *supra* note 527 at 103.

⁶⁰³ *Ibid* at 148,149.

⁶⁰⁴ Roy, *supra* note 527 at 104.

⁶⁰⁵ *Arar Commission*, *supra* note 588 at 601.

⁶⁰⁶ *Ibid* at 596.

Air India Commission

In 2010, the work of another inquiry was completed, this time focussing on the efficacy of the agencies⁶⁰⁷: *the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (“*Air India Commission*”).⁶⁰⁸ The incident that was examined had happened back in 1985, when two bombs had been placed on two flights of Air India, departing in Canada and killing 329 people. The incident was considered as an example of “intelligence failure”.⁶⁰⁹ SIRC had already started to investigate the incident in the 1980s, but had to fight against resistance from the agencies and the government.⁶¹⁰ Furthermore, SIRC was once again limited to only reviewing CSIS conduct even though the RCMP was also involved.⁶¹¹ Notwithstanding its large amount of recommendations, the Air India Commission did not pick up the idea of establishing a committee of parliamentarians.

Afghan Detainees

The “Afghan Detainee” situation was the next Canadian scandal in the field of national security. In the years 2006 and 2007, Taliban fighters who were caught by Canadian forces in Afghanistan were handed over to the Afghan authorities, either without assessing whether they might be exposed to torture and mistreatment there or without caring sufficiently. A House of Commons Special Committee on the Canadian Mission in Afghanistan in Parliament was established to investigate the treatment. Since documents with secret information were not given to the Committee and the witnesses were, except for Richard Colvin, not speaking out⁶¹², the parliamentarians of the opposition felt that their common parliamentary privilege was violated.⁶¹³ The Committee, and then the House as a whole, adopted a motion for the government to produce all relevant documents in unredacted form to the Committee, but the government refused.

On April 27th, 2010, the Speaker of the House of Commons, Milliken, gave a ruling that held the government in contempt of Parliament, stating that it was “‘the fundamental role of Parliament to hold the Government to account’ for the actions of its officials.”⁶¹⁴ Although Parliament often agrees to the refusal of government to disclose certain

⁶⁰⁷ Whitaker “Post 9/11”, *supra* note 601 at 149.

⁶⁰⁸ *Air India Commission*, *supra* note 550.

⁶⁰⁹ Whitaker, Kealy & Parnaby, *supra* note 546 at 375.

⁶¹⁰ *Air India Commission*, *supra* note 550, Volume 1 at 141.

⁶¹¹ Whitaker, Kealy & Parnaby, *supra* note 546 at 388.

⁶¹² Explanatory Note: Mostly because of Solicitor-Client-Privilege or s. 38 of the Canada Evidence Act.

⁶¹³ Furthermore, the government interfered with the investigation of the Military Police Complaints Commission on this matter; Canada, Military Police Complaints Commission, Final Report following a Public Interest Hearing pursuant to Subsection 250.38 (1) of the National Defence Act, File: MPCC 2008-042 (Ottawa, June 2012) at pages 505 et seq., Part XVII; for one example of an exchange of arguments during the proceedings see the transcript in <http://www.mpcc-cppm.gc.ca/03/afghan/2009-10-14-eng.aspx>.

⁶¹⁴ Heather MacIvor, “The Speaker’s Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?” (2010) 19:1 Constitutional Forum 11 at 13-14, citing Canada, Parliament, *House of Commons Debates*, Parl 40th, Sess 3rd, No. 034 (27 April 2010) at 2043 (Speaker Milliken).

documents containing national security information, this “was a description of practice and not a binding precedent”.⁶¹⁵ “The right of Parliament to obtain all possible information on public questions is undoubted and the circumstances must be exceptional, and the reasons very cogent, when it cannot be at once laid before the House.”⁶¹⁶ Unfortunately, the ruling only “produced an ad hoc compromise with government that allowed a few members of Parliament, assisted by retired judges, to have limited access to at least some secret documents.”⁶¹⁷ After the 2011 election, when the Conservatives won a majority and shut down the ad-hoc parliamentary process when it was only partway through its work, ground-breaking and innovative discussions on the role of Parliament in holding the government into account came to an end.

Senate Committee, 2011

In 2011, another Special Senate Committee on Anti-Terrorism published an interim report, recommending the establishment of a parliamentary committee, and emphasising that the Senate Committee “strongly believes that parliamentarians must be fully informed about national security activities so that they can more effectively defend the interests of Canadians.”⁶¹⁸ The Committee recommended a committee consisting of members of both Houses of Parliament, reviewing the “expenditures, administration and policy of federal departments and agencies”.⁶¹⁹ When necessary, the sessions should be held *in camera*. The members would be appointed by the Governor in Council, and they would have to swear an oath of secrecy. They would report to the Prime Minister who would have to make the report public (if censored, then including information on the fact of a section being censored). However, reports and findings from Senate committees are rarely paid attention to⁶²⁰ and this was no exception in the 2011 – 2015 period of majority government.

In conclusion, although there have been recommendations to create a committee of parliamentarians in the last 30 years by various inquiries and by different committees, none of the recommendations have been acted upon. There were, furthermore, several unsuccessful legislative attempts in the last ten years. These will be discussed in the next paragraph.

⁶¹⁵ *Ibid* (MacIvor) at 14.

⁶¹⁶ Canada, Parliament, *House of Commons Debates*, Parl 40th, Sess 3rd, No. 034 (27 April 2010) at 2042 (Speaker Milliken), citing John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 1884 at 281.

⁶¹⁷ Whitaker, Kealy & Parnaby, *supra* note 546 at 406.

⁶¹⁸ Canada, Senate, Interim Report of the Special Committee of the Senate on Anti-terrorism, *Security, Freedom and the Complex Terrorist Threat: Positive Steps Ahead* (Ottawa: The Senate, 2011) at 42.

⁶¹⁹ *Ibid* at 45.

⁶²⁰ Whitaker, Kealy & Parnaby, *supra* note 546.

Bills 2005-2016

In November 2005, the Minister of Public Safety and Emergency Preparedness tabled an Act to establish the National Security Committee of Parliamentarians—*Bill C-81*.⁶²¹ It did not become law, “in large part due to the intensifying partisan environment of a minority and scandal-plagued Liberal Government struggling to survive.”⁶²² An election was called within a month of *Bill C-81* being introduced, the result of what was the first minority government of Stephen Harper.

Bill C-81 set out a joint committee that would have included not more than three Senators and not more than six members from the House of Commons. The members would have been appointed by the Governor in Council, who would then have appointed the Chair among the members of the committee. The members would have had to swear an oath of secrecy and would furthermore have not been able to claim immunity on grounds of parliamentary privilege regarding their knowledge obtained in the committee. The mandate would have included “the legislative, regulatory, policy and administrative framework for national security in Canada, and activities of federal departments and agencies in relation to national security; and any matter relating to national security that the Minister refers to the Committee.”⁶²³ Regarding access to information, the committee would have had to ask the Minister to provide the information, who would also have had the right to deny access to it completely or in part. The only safeguard would have been a consultation of the minister with the Chair and, on request, the issuing of a written statement. The committee would have had to report annually about its work. Before transferring it to Parliament, the Prime Minister would have had the right—after consultation with the Chair—to exclude certain parts that could not be disclosed for reasons of national security, defence or international relations.

The fact that the committee would have had to review only specific matters relating to national security which a Minister referred to the body might be considered as a back-door entrance for governmental misuse. It might have been possible to overload the committee with rather small issues, thereby limiting its capacity to focus on other issues. Since the Chair was going to be appointed and not elected, the Bill’s respective safeguards (consultation with the Chair over the information provided and the non-disclosure of parts of the report) can hardly be seen as effective, since a Chair of the governing party might possibly not exercise effective control over the powers of the Ministers and the Prime Minister.

Despite the weaknesses of the Bill, its wording and provisions were reintroduced to Parliament several times in various private members’ business bills (PMB’s) by Liberal MPs, in 2007 and 2009 by MP Derek Lee (*Bill C-447*⁶²⁴, *Bill C-*

⁶²¹ Bill C-81, *An Act to establish the National Security Committee of Parliamentarians*, 1st Sess, 38 Parl, 2004-2005 [*Bill C-81*].

⁶²² Roy, *supra* note 527 at 102.

⁶²³ *Bill C-81*, *supra* note 621, s 13.

⁶²⁴ Bill C-447, *An Act to establish the National Security Committee of Parliamentarians*, 39th Parl, 1st Sess, 2006-2007 [*Bill C-447*].

352⁶²⁵), and in 2013 by MP Wayne Easter (*Bill C-551*⁶²⁶). In May 2014, Senator Hugh Segal introduced *Bill S-220*⁶²⁷ to the Senate. The Act would have created an Intelligence and Security Committee of Parliament. Senator Segal, who had been Chair of the Special Senate Committee of 2011, used the UK version (the Intelligence and Security Committee) as a role model for his proposal. *S-220* would have created a committee with nine members of both houses, three members from the Senate and six from the House of Commons. The Senators would have only been appointed after a consultation of the Prime Minister with at least one other Senator. Furthermore, “[a] member of either House may only be appointed as a member of the Committee after approval of the appointment by resolution of that House.”⁶²⁸ Differing from *Bill C-81* in 2005, the Chair would have been elected by the members of the committee. *S-220* would not have needed to request access to information from the respective minister but the committee would have had the powers to “summon before it any witness”⁶²⁹ and to get access to all information apart from information falling under s 39 (1) of the *Canadian Evidence Act* (Cabinet confidences). As an additional safeguard, the Prime Minister would have had to release a statement if he/she excluded parts of the report before referring it to Parliament. Also in 2014, MP Joyce Murray introduced a Bill to the House of Commons, proposing a Committee of Parliament—*Bill C-622*.⁶³⁰ Her model consisted of three Senators and six Members of the House of Commons, including a safeguard clause that only four members of the House of Commons might be from the same political party. Like Senator Segal, she also proposed an elected Chair and an approval clause for members from either house. The bill included clauses dealing with the staff for the committee and its estimates. The mandate, for the first time, also mentioned the committee’s obligation to “report publicly on its activities, findings and recommendations”⁶³¹, thereby emphasising the connection between transparent democracy and the committee. The Committee would also have had the right to summon any witnesses and to access any information (except again for s 39(1) of the *Canada Evidence Act*⁶³²). Particularly interesting is the section on the report to Parliament, since it included a clause that the report had to contain detailed information to “meaningfully inform Parliament and the public”.⁶³³ Although the Prime Minister would have had the power to ‘censor’ parts of the annual report of the committee, the Chair could have “disclose[d] to the public the general nature of any information that has been excluded from the report by the Prime Minister [...] as long as the disclosure does not reveal the substance of the excluded information”.⁶³⁴ *Bill C-622*

⁶²⁵ Bill C-352, *An Act to establish the National Security Committee of Parliamentarians*, 40th Parl, 2nd Sess, 2009 [Bill C-352].

⁶²⁶ Bill C-551, *An Act to establish the national security committee of Parliamentarians*, 41st Parl, 2nd Sess, 2013 [Bill C-551].

⁶²⁷ Bill S-220, *An Act to establish the Intelligence and Security Committee of Parliament*, 41st Parl, 2nd Sess, 2014 [Bill S-220].

⁶²⁸ *Ibid*, s 4(3).

⁶²⁹ *Ibid*, s 16.

⁶³⁰ Bill C-622, *An Act to amend the National Defence Act (transparency and accountability), to enact the Intelligence and Security Committee of Parliament Act and to make consequential amendments to other Acts*, 41st Parl, 2nd Sess, 2013-2014 [Bill C-622].

⁶³¹ *Ibid*, s 15.

⁶³² *Canada Evidence Act*, RSC 1985, c C-5 [Canada Evidence Act].

⁶³³ *Bill C-622*, *supra* note 630, s 18(2).

⁶³⁴ *Ibid*, s 18(6).

therefore particularly emphasised the importance of informing parliament and the public in a detailed manner. However, none of the bills entered into force.

b) Status Quo: Bill C-22, An Act to Establish the National Security and Intelligence Committee of Parliamentarians

Since the debate about the creation of a Committee of Parliament started anew in the discussions on *Bill C-51*, in June 2016, the new Liberal Government introduced yet another Bill to establish a National Security and Intelligence Committee of Parliamentarians.

The mandate of the Committee in *Bill C-22* was to

review the legislative, regulatory, policy, administrative and financial framework for national security and intelligence; any activity carried out by a department that relates to national security or intelligence, unless the activity is an ongoing operation and the appropriate Minister determines that the review would be injurious to national security; and any matter relating to national security or intelligence that a minister of the Crown refers to the Committee.⁶³⁵

The Committee may therefore not only review activities but also has the right to oversee the activities (with the exception mentioned in the provision).

In the original draft version of June 2016, the Committee consisted of up to eight members from both Houses of Parliament and a chair. In the final version of the Bill⁶³⁶, the number of MPs has increased to 11 members (including the chair).⁶³⁷ The idea of *Bill C-622* to allow only a certain number of MPs of the House of Commons (5/8) in the Committee to stem from the government parties to “counter majority party domination”⁶³⁸ is adopted. With five out of eight members of the House of Commons who may be members of the governing parties as well as, in addition, up to three Senators (without specifications), it is more than doubtful that the clause will protect from party domination. The fact that the Prime Minister has to consult inter alia the “leader of every caucus and every recognized group in the Senate” before a Senator may be appointed to the Committee is only a small safeguard if the consulted people don’t actually have a veto or a similar right. The Governor in Council will then appoint the members of the Committee, “on the recommendation of the Prime Minister.”⁶³⁹ However, in contrast to both *S-220* and *C-662*, the chair in *C-22* will not be elected by the members of the committee but appointed by the Governor in Council upon the recommendation of the Prime Minister, a fact which may show some mistrust in the Parliamentarians.⁶⁴⁰ A clause that would grant the Chair a double vote was abolished at the Committee stage though; now the Chair “may vote at meetings of the Committee only in the case of a tie.”⁶⁴¹ For the first time, a security clearance for the members of the

⁶³⁵ *Bill C-22* (final version), s 8.; While *Bill C-22* received royal assent in June 2017 and this now takes the form of an adopted statute, I will continue to refer to *Bill C-22* because that is the moniker by which this piece of legislation is best known.

⁶³⁶ *Bill C-22* (final version).

⁶³⁷ *Bill C-22* (final version), s 4 (1).

⁶³⁸ Whitaker, Kealy & Parnaby, *supra* note 546 at 409.

⁶³⁹ *Bill C-22* (final version), s 5 (1).

⁶⁴⁰ In contrast to the old Bills, there would not only be remuneration for the chair but also for the other members of the committee.

⁶⁴¹ *Bill C-22* (final version), s 19.

committee was made obligatory, whereas in the previous proposed bills, the swearing of an oath had been considered sufficient. Even in the *MacKenzie Commission*, it had been seen as highly problematic to have parliamentarians subject to security clearances. The MacDonald Commission had also dealt with the problem of security clearance and concluded that it should be sufficient to consult the security agencies before an appointment (see above).

As MP Chagger pointed out, a “key element of [C-22] [...] is the ability of the committee to initiate reviews of any national security operations, including ongoing operations.”⁶⁴² Because of that scope, she justified the different limitations to the Committee’s powers (see below). According to s 13 of *Bill C-22*, the Committee “is entitled to have access to any information that is under the control of a department and that is related to the fulfilment of the Committee’s mandate.”⁶⁴³ The clause is similar to the clause of the original draft of June 2016. There had been major amendments done at the Committee stage but they were deleted at the report stage, drastically limiting the rights of the Committee again. The draft that was agreed upon at the Committee stage additionally entitled the Committee “to send for persons, papers and records”, therefore also to subpoena witnesses.⁶⁴⁴ The government, however, rejected this change of *Bill C-22* and had it voted down at report stage, stating that “[e]ssentially, under section 13 and 15, both the government and the committee would have the power to determine who should appear to provide testimony, and yet there is no recourse mechanism to solve the deadlock.”⁶⁴⁵ It was not mentioned, however, that such a “deadlock” could easily be bypassed: other possibilities could be that all witnesses chosen by either government or Committee would be called or to always let the Committee, not the government, decide on whom to ask oral questions.

For the first time, a clause that calls for cooperation with the other review bodies is included to prevent a duplication of work. Furthermore, a kind of whistle-blower clause for the Committee has been incorporated into the bill. The Committee not only has the right to but “must inform the appropriate Minister and the Attorney General of Canada of any activity that is carried out by a department and is related to national security or intelligence and that, in the Committee’s opinion, may not follow the law.”⁶⁴⁶ The exertion of this power, however, would need the Committee to have access to sufficient and thus also possibly sensitive information, which might not easily be the case under the current *Bill C-22* structure (see below).

The mandate set out in *C-22* is limited again compared to older Bill proposals. A minister can stop the review process if he “determines” it would be “injurious to national security”⁶⁴⁷, thereby having the power to veto the review (or

⁶⁴² Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 82 (27 September 2016) 5132 (MP Chagger) [*Hansard*, 27 September 2016].

⁶⁴³ *Bill C-22* (final version), s 13 (1).

⁶⁴⁴ *Bill C-22* (version of December 9th, 2016), s 13 (1).

⁶⁴⁵ Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 150 (08 March 2017) at 9533 (MP Bardish Chagger).

⁶⁴⁶ *Bill C-22* (final version), s 31.1.

⁶⁴⁷ *Ibid*, s 8.

oversight of an ongoing operation) of the committee. There is also no definition of “injurious to national security” provided in the legislation, which might give way to different interpretations of the clause. There is no comparable clause in the mandate of SIRC, which—again—likely shows some mistrust in the committee by the government. At the Committee stage of the Bill, a safeguard was added, however, stating that the Minister must firstly give reasons to the Committee if he relies on the clause “injurious to national security”, and secondly, that he/she must tell the Committee once the oversight would cease to be injurious to national security or once the activity came to an end so that the Committee might review the activity then.⁶⁴⁸

Section 14 of *Bill C-22*, in the first draft, mentioned several (seven) restrictions for the Committee to gain access to secret information. Thereby, the clause was much more restrictive than the preceding bills and recommendations by the inquiries. The Committee would not have access to the Cabinet confidence⁶⁴⁹, a provision which thus corresponded to the limit on access to information for SIRC. Whereas this had been the only limitation in the previous proposed bills, this time, the committee would also not be able to access information “respecting ongoing defence military operations”.⁶⁵⁰ Thus, it would have not been possible, for example, to review the Afghan detainee case while it was ongoing. The provision would thereby very much be in contradiction to the Speaker’s ruling of 2010. Furthermore, the Committee should not get access to information “relating to an ongoing investigation carried out by a law enforcement agency”⁶⁵¹, which would have ruled out the possibility to, for example, review Toronto 18 case⁶⁵² or the Air India Bombings. As MP Clement stated in the parliamentary debate, “removing information directly relating to law enforcement investigations that may lead to a prosecution essentially removes all RCMP participation in this committee. Quite literally, any action taken by RCMP National division may lead to a prosecution.”⁶⁵³ It again seems as if the distrust of or suspiciousness against parliamentarians, which was already discussed in the MacDonald report, has not decreased in the last thirty years. Because of its implications, the clause was very much debated in Parliament at the Committee stage and was then completely abolished apart from the cabinet confidence provision. The newest version that was restored at Report Stage, however, takes up several of the provisions of the first draft. Besides the Cabinet confidence, the Committee

is not entitled to have access to [...] information of which is described in subsection 11 (1) of the Witness Protection Program Act; the identity of a person who was, is or is intended to be, has been approached to be, or has offered or agreed to be, a confidential source of information, intelligence or assistance to the Government of Canada, or the government of a province or of any state allied

⁶⁴⁸ *Ibid*, s 8 (2), (3).

⁶⁴⁹ *Canada Evidence Act*, *supra* note 632, s 39(2).

⁶⁵⁰ *Bill C-22*, *supra* note 486, s 14 (b).

⁶⁵¹ *Ibid*, s 14(e).

⁶⁵² A group of 18 people had planned on storming Parliament Hill in Ottawa and to detonate bombs in Toronto but were under surveillance by CSIS and the RCMP and were thus arrested before realizing the plot.

⁶⁵³ Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 150 (08 March 2017) at 9540 (MP Tony Clement).

with Canada, or information from which the person's identity could be inferred; information relating directly to an ongoing investigation carried out by a law enforcement agency that may lead to a prosecution.⁶⁵⁴

Whereas s 15 of *Bill C-22* permits information to be requested by the Committee from the responsible Minister (with exceptions in subsection 2), according to s 15 (3) the Minister must then “provide or cause to be provided to the Committee, in a timely manner, the requested information to which it is entitled to have access.”⁶⁵⁵ There is no exact definition or defined understanding of the phrase “in a timely manner”, thus possibly granting a Minister the right to withhold information for a rather long and decisive period of time. Whereas the Committee stage had rejected the provision in s 16 (“Refusal of information”), the provision was restored at Report Stage. This means that the Committee must make a request for information to the respective minister, who then has the chance to deny access because of security reasons (applying again the phrase “injurious to national security”⁶⁵⁶).

The ministerial vetoes in the mandate and access-to-information clause are set out as final decisions in s 31, thereby also preventing the committee from going to court. As well, the access of the members to parliamentary privilege is limited by s 12. Furthermore, compared to the bills prior to *C-22*, the power of the Prime Minister to have the annual report revised has grown. Now, not only national security but also international relations and national defence are reasons for demanding a “censored” parliamentary and/or public version of the report.⁶⁵⁷ The powerful position of the Prime Minister that was already set up in the proposed *Bill C-81* has thus been taken further. Ms. Murray's very progressive approach in 2014, suggesting for example to have a Chair who would be allowed to talk publicly about the “general nature of the excluded information”, has not been followed. Again, the very limited approach of *Bill C-81* was adopted by *Bill C-22* and thus no written statement of the Prime Minister mentioning the reasons for his assessment is required. New provisions do, however, make it necessary to clearly state if a report has been revised, including the reasons thereof.⁶⁵⁸ The report will furthermore also be forwarded to the national security committees of Senate and House of Commons.⁶⁵⁹ *Bill C-22* also establishes a Secretariat “to assist the Committee in fulfilling its mandate”. Due to the limited length of the thesis, the thesis won't address the problems of providing for an adequately funded staff with sufficient expertise. The issues will be mentioned in more detail in the conclusion to give a hint for further research.

⁶⁵⁴ *Bill C-22* (final version), s 14.

⁶⁵⁵ *Ibid*, s 15 (3).

⁶⁵⁶ *Bill C-22*, supra note 486, s 16(1)(b).

⁶⁵⁷ *Bill C-22* (final version), s 21 (5).

⁶⁵⁸ *Ibid*, s 21 (5.1).

⁶⁵⁹ *Ibid*, s 21 (7).

IV. Influence of the Five-Eyes Membership

Canada is a member state of the “United Kingdom United States of America Agreement”, thus a full member (and not a third party) of the so-called “Five Eyes information sharing alliance”. This agreement dates back to a collaboration of the United States with the United Kingdom as well as Canada, Australia and New Zealand⁶⁶⁰ and stands for a close cooperation in the field of intelligence gathering, particularly signal intelligence. The agreement has particularly been in focus after the Snowden revelations that the member states had spied not only on third parties, but on close allies of the five member states, such as Germany.⁶⁶¹ In the words of the LIBE inquiry of the European Parliament: “[r]aw personal data collected through [different, for example PRISM,] programmes is shared in bulk between the intelligence communities of the US, the UK, Canada, Australia and New Zealand under the ‘Five Eyes’ agreement.”⁶⁶² The activities of the five Eyes had already been the focus of attention in the European Union because of the so-called ECHELON-affair, when it became known that the Five Eyes states recorded “international telecommunications with the help of a monitoring program called ECHELON [...]. ECHELON is used to monitor satellite-based telephone calls, fax and Internet communications”.⁶⁶³

There is no formal oversight body that is responsible for the Five Eyes. Morgan argues that there is instead “institutional convergence” in terms of oversight of the Member States to the Five Eyes Agreement.⁶⁶⁴ This convergence may now also be more obvious since the *Bill C-22* is largely based upon the model of the parliamentary committee of the UK.⁶⁶⁵ However, there is no body that is transnationally responsible for all States to the Agreement. Whereas the deep impact of the Five Eyes on the collection of intelligence and the modern mass surveillance tactics is commonly acknowledged, their role in the field of parliamentary control may still be considered as rather limited. However, the agreement might indeed limit the powers of any parliamentary control body: either might shared intelligence not fall within their mandates or its disclosure might be seen as threatening any relationship with the Five-Eyes members. I will therefore not elaborate further on the Five Eyes but turn to the assessment and comparison of the German and Canadian models, especially with regard to possible lessons that Canada might learn from the German experience.

⁶⁶⁰ United States, National Security Agency, online: National Security Agency <<https://www.nsa.gov/news-features/declassified-documents/ukusa/>>.

⁶⁶¹ Patrick F. Walsh & Seumas Miller, “Rethinking ‘Five Eyes’ Security Intelligence Collection Policies and Practice Post Snowden” (2016) *Intelligence & National Security* 31:3 at 345-368.

⁶⁶² European Union, European Parliament, LIBE, Inquiry on Electronic Mass Surveillance of EU Citizens, “Protecting Fundamental Rights in a Digital Age” (2013-2014) at 80,81.

⁶⁶³ “[I]nternationale Telekommunikation mit Hilfe eines Überwachungsprogramms namens ECHELON [...]. ECHELON dient zur Überwachung der über Satellit geleiteten Telefongespräche, Telefaxverbindungen und Internetkommunikation”. (Translation mine). Thomas Petri, “Déjà vu – datenschutzpolitische Aufarbeitung der PRISM-Affäre. Appell nach mehr Transparenz der nachrichtendienstlichen Tätigkeit” (2013) *ZD* 557 at 557.

⁶⁶⁴ Richard Morgan, “Institutional Convergence and the structure and oversight of intelligence activities” in Zachary K. Goldman & Samuel J. Rascoff, eds, *Global Intelligence Oversight, Governing Security in the twenty-first century* (Oxford: Oxford University Press, 2016).

⁶⁶⁵ Canada, Library of Parliament, Legislative Summary Bill C-22, Publication No. 42-1-C22-E, 22 August 2016 at 1, online: <<https://lop.parl.ca/content/lop/LegislativeSummaries/42/1/c22-e.pdf>>.

Chapter III: Parliamentary Control of the Agencies in Canada and Germany: A Comparative Approach

The previous two chapters of this thesis helped to draw some provisional conclusions. Firstly, they showed that there is a common debate, in two countries with a distinct legal history, on how to balance security with the citizens' liberties as well as human rights in general. Secondly, this debate often led the people involved, in discussions as well as in practice, to the conclusion that intelligence services and their work was necessary but had to be accompanied by an effective review mechanism—if possible in parliament itself in order to increase its (democratic) legitimacy. Thirdly, the exact approach to and character of such a parliamentary review/oversight body is still unclear and has been a constant point of discussion: questions as to which powers are necessary for which actors and how to protect secret information are two examples in a debate that has taken place in both countries over—at least—the last forty years. Fourthly, Germany has, despite its long history with an existing parliamentary control panel (or commission), neither found nor claimed to have found the perfect solution, the right model or the most effective answer to the different problems that emerge when trying to limit as well as support the work of both security services and parliamentary control bodies, and has constantly reformed the system. Therefore, fifthly, all the historical and political as well as technical developments, all the solutions and ideas that were put forward and discussed and that led to the current legal status quo in Germany and the final version of *Bill C-22* in Canada are clear indications that this will probably not be the end of the story. This chapter will therefore compare, on the one hand, the Canadian and the German ways of trying to achieve an effective parliamentary control mechanism. It will, on the other hand, assess recent criticism, new ideas, changes to legislation currently proposed in connection with the PKGr in Germany and possible lessons that can be learned from the German debate for work on the Committee and *Bill C-22* in Canada. Because of the limited length of this thesis, not all relevant topics that have been mentioned in Chapter 1 and 2 will be revisited more closely here.

I. Necessity of Intelligence Agencies

Before turning to the different opinions on a parliamentary control body (in either of the two countries), one has to deal with an extreme point of view: some people call into question the existence of intelligence and secret services in general. Of course, in both states, a high percentage of the debaters in both states on parliamentary control—parliamentarians as well as legal experts and scholars—are indeed in favour of the existence of secret services.

In Germany, Bündnis 90/Die Grünen as well as Die Linke have publicly announced as well as proposed several bills to abolish the secret services—not least because of the difficulties of reviewing their actions and activities.⁶⁶⁶ Their arguments have mostly been focussed on the BfV⁶⁶⁷, thus, the protection of citizens' as well as residents' rights. In 1994, Bündnis 90/Die Grünen argued: "[t]he secret services in general represent a threat to democracy. They are not even effective within their own responsibilities, and even commit, like the Federal Intelligence Service, in some cases criminal offences. They must therefore be dissolved."⁶⁶⁸ In 2015, Die Linke argued "[...] that it is a democratic task and challenge in the long term, to work toward the gradual abolition of the secret services."⁶⁶⁹ However, in this statement, the problem may be the word "democratic". In the light of terrorist attacks and the reaction of politicians and parts of the media afterwards (demanding even more security, more extensive surveillance etc.), people would probably feel unsafe without the secret services. The role of politicians and parts of the media in making people accept any new powers of the services and possible violations of fundamental rights to get the level of security that they consider necessary, will be discussed below. A recent example of this trend of politicians to emphasise the need for security—against any safeguards of the rule of law principle—might be Theresa May's announcement to increase security, even by abolishing fundamental rights laws that would stand in her, and thus she claims security's way.⁶⁷⁰

Probably, without secret services and agencies, public trust in parliamentarism may be even more weakened if people would no longer feel protected, particularly in times where the call for security is so prominent in the political debate. To assure the citizens that enough was done to protect them from any—mostly terrorist—harm without the help of one's own secret services, the dependency upon foreign services would grow. Important information would also then have to be procured or processed by the police (which in Germany would lead to an infringement of the principle of separation) or by any other new institution that would replace the current national agencies. Furthermore, foreign agencies would not respect the fundamental rights of the citizens to the same degree as domestic agencies. Often, for example currently by the German government, fundamental rights concerning privacy are read in a way that only domestic citizens are protected (see above). Therefore, even the parties who have been most critical of intelligence and secret services are now arguing in favour of the latter's work. Just recently, in June 2017, *Der Spiegel* published an article demonstrating the change of the party politics in each party in terms of national security. Even

⁶⁶⁶ Today, Bündnis 90/Die Grünen no longer argue for the general abolition of the intelligence services.

⁶⁶⁷ Heinrich Böll Foundation, "Modelle zur Reform und Abschaffung der Geheimdienste" (25 July 2014), online: <https://www.boell.de/de/2014/07/25/modelle-zur-reform-und-abschaffung-der-geheimdienste>.

⁶⁶⁸ "Die Geheimdienste insgesamt stellen eine Gefahr für die Demokratie dar. Sie sind nicht einmal innerhalb ihrer eigenen Aufgabenstellung effektiv und begehen, wie der Bundesnachrichtendienst, zum Teil selbst Straftaten. Sie müssen deshalb aufgelöst werden." (Translation mine). Bündnis 90/Die Grünen, Manifesto Elections to the Bundestag 1994, "Nur mit uns" (1994) at 60.

⁶⁶⁹ "[...] dass es langfristig eine demokratische Aufgabe und Herausforderung ist, auf die schrittweise Abschaffung der Geheimdienste hinzuwirken." (Translation mine). BT-Drucksache 18/6645, *supra* note 376 at 1.

⁶⁷⁰ "Theresa May: Human rights laws could change for terror fight", *BBC.com* (07 June 2017), online: www.bbc.com/news/election-2017-40181444.

parties such as the FDP (Liberals), Die Linke (to a lesser extent) and Bündnis90/Die Grünen have considerably shifted from being highly critical of security services and the encroachment upon fundamental rights to more of a “security”-focus, tolerating and legitimating many activities that would have been condemned before.⁶⁷¹ The ultimately negative perspective on intelligence and secret services might thus be less and less prominent, ending the debate on the services’ right to exist. It is doubtful that there was even a possibility to just abolish the agencies. A country such as Canada, being a member of the Five Eyes, or Germany, as a third party to the agreement (and many others) would not be able to just shut down its services without provoking international tensions with its agreement partners. Although secret services in both countries, Germany and Canada, and probably in every other country, have—to some extent—disrespected fundamental rights, exceeded limitations to their powers and created an ominous network of collaborations and interdependencies, the time to abolish the agencies has probably long passed.

II. Access to Information

Therefore, one may start the discussion with the structure and the rights of the Canadian Committee of Parliamentarians (NSICOPS) and the German Parliamentary Control Panel (PKGr) since these bodies are ultimately the attempt to not only concentrate on the security aspects but also on the protection of fundamental rights in times of an increasing amount of data collection, information and intelligence sharing and growing powers of secret services.

To start the discussion on the German Parliamentary Control Panel and the new Canadian Committee, one might turn to the bodies’ access to information. One prominent way to describe the German Panel has been coined by Gusy, calling the parliamentarians “blind guardians” (*blinde Wächter*)⁶⁷², with the word ‘blind’ referring to the lack of information of the control panel. Indeed, it is easy to determine that no control is possible without knowing what is to be controlled. Therefore, one may argue that the most crucial point for an effective review and/or oversight body is the amount of information it can get from the government itself, from the agencies, or through rights that make it possible to get informed without being dependent on the government, by, for example, subpoenas of witnesses (without a needed consent of the government/agencies). Without a proper and sufficient access to information, no parliamentary control body of Parliament can fulfil the obligations of its mandate. Rather, the debate is concentrating on what can be considered as a ‘sufficient’ amount of information.

In the current version of the *PKGr Act* in Germany, § 4 sets out the “Obligation of the Federal Government to inform”⁶⁷³ in terms of the general activities and special occurrences.⁶⁷⁴ The provision has therefore been worded in the

⁶⁷¹ Florian Gathmann, Kevin Hagen, Annett Meiritz & Michel Winde, “Neue deutsche Härte”, *Spiegel Online* (15 June 2017), online: www.spiegel.de/politik/deutschland/terror-und-innere-sicherheit-die-neue-deutsche-haerte-a-1152113.html.

⁶⁷² Gusy, “Grundrechte”, *supra* note 30 at 132.

⁶⁷³ “Pflicht der Bundesregierung zur Unterrichtung” (Translation mine).

⁶⁷⁴ Other obligations of the government to inform the PKGr can be found in the Acts on the respective services.

passive (in the sense that the PKGr is the recipient on information on which another party has the active obligation to provide); no active claim has been formulated. However, if the Control Panel wants to be informed about other occurrences, it needs itself to claim information from the government. As mentioned above in the section on the German law, the problem with the latter is the fact that the members of the Panel would need to know what they were looking for, for example, with the help of media reports. This explains MP Ströbele's judgement that the Panel often only gets its information from the media. To summarise the Panel's rights quickly, the Panel may request files and electronic data. It furthermore has the right to access the localities of the agencies (see below). Additionally, the Panel may question employees of agencies, departments and the government or request written information. The government needs to comply "immediately" (§ 5).

In contrast, the Canadian version does not differentiate between different "occurrences"; instead, the Canadian provision on access to information is very broad (s 13), giving the Committee the right to have access to any information it needs to fulfil its duties (if the information is not exempted in another provision). That said, the ability of the government to block committee scrutiny and thus, by definition, access to information when a matter is deemed "operational" cuts back on the initial breadth of the Committee's right of access. The access to information is called a right, making it sound more active than passive (being dependent on another's obligation that is not expressed in terms of your own right), and thus also more powerful. The Committee does, however, not have the right to subpoena witnesses and documents (see below). As just mentioned, the specific amount of information depends on the respective mandate of the control body (the PKGr and the NSICOP), as the body "should have an unlimited access to the information necessary for discharging its duties."⁶⁷⁵

The PKGr's mandate is defined in rather broad terms: "The Federal Government shall be subject to the control of the Parliamentary Control Panel with regard to the activities of the [BND, MAD and BfV]."⁶⁷⁶ *Bill C-22* on the contrary lists the specific tasks of the Committee, does not specifically only refer to the government but also the agencies and departments conducting national security activities and makes it possible for the Committee to review "any matter relating to national security or intelligence that a minister of the Crown refers to the Committee."⁶⁷⁷ The Committee's mandate is therefore somehow more extensive, since it also includes possible topics that do not involve activities of the services but concerns national security. It is striking, that the mandate of the Committee is partly subject to limitations. As mentioned in the preceding paragraph, a minister may hinder the oversight for the time of "ongoing operations" if it would be—in his opinion— "injurious to national security."⁶⁷⁸ This limitation therefore applies to a

⁶⁷⁵ Hans Born & Ian Leigh, "Democratic Accountability of Intelligence Services", Policy Paper No. 19 (Geneva Centre for the Democratic Control of Armed Forces, 2007) at 12.

⁶⁷⁶ "[...] [d]ie Bundesregierung unterliegt hinsichtlich der Tätigkeit des Bundesamtes für Verfassungsschutz, des Militärischen Abschirmdienstes und des Bundesnachrichtendienstes der Kontrolle durch das Parlamentarische Kontrollgremium." (Translation mine).

⁶⁷⁷ *Bill C-22* (final version), s 8 (1).

⁶⁷⁸ *Ibid*, s 8 (2).

level before those of the access of information. It therefore seems reasonable to ask whether this assessment may not be used by the government as a means of “leading” the Committee according to the government’s own interests. The reasons the minister has to give for his decision are—with the Committee having no access to information—probably rather difficult to assess by the parliamentarians. Furthermore, it needs to be mentioned that neither SIRC nor the Commissioner of CSEC have a comparable limitation to their mandate.

The *Bill C-22* committee mandate is at least trying to close the accountability gaps in the sense that it covers all activities in the realm of national security. In Germany, due to its limited mandate (and the principle of separation), the PKGr cannot control activities of the Federal Criminal Police Office (*Bundeskriminalamt*, “BKA”), although it is, according to § 4 a of the *Federal Criminal Police Office Act* (“BKA Act”)⁶⁷⁹, dealing with the defence of the dangers constituted by international terrorism. Even when institutions cooperate, the PKGr can only review that part of the activity that is carried out by one of the three agencies mentioned in its mandate. These kinds of accountability gaps have been prevented by the broader mandate in Canada, learning from the difficulties of the current review bodies, for example SIRC, whose mandate is too limited to effectively control activities if there is any kind of information sharing between agencies involved.

In general, the rights of the Committee and the Panel must be sufficient to enable their members to fulfil their mandates. The first possible problem with the Canadian limitations to the mandate has already been mentioned. Another problem may be its limited right to self-information. Whereas in Germany the Panel nowadays has the right to hear employees of the agencies/the government (however, not just any witness and without them being formal witnesses according to the Criminal Procedure Code, see below) and request (electronic) files, the Canadian committee does not get any of those rights. Indeed, the rights were explicitly deleted from the Bill before the report stage.

In a judgement of the German Federal Constitutional Court (concerning—once again—the rights of a Committee of Inquiry), the Court highlighted the importance of the right to inspection of records: “Files are a particular important piece of evidence in the investigation of political events. As a rule, they have a higher probative value than testimonies, because the memory of witnesses can become unfruitful in many respects.”⁶⁸⁰ This statement only makes sense if the agencies are indeed obliged to compile files to a sufficient level, because otherwise, it would basically be possible to undermine this right of the review body. It is up to the minister to decide on the exact data to be disclosed.⁶⁸¹ The

⁶⁷⁹ *Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten* (*Federal Criminal Police Office Act*), Federal Law Gazette I, 1997 at 6159 as last amended by Article 2 of the Act of 1 June 2017, Federal Law Gazette I, 2017 at 1354 [*BKA Gesetz*].

⁶⁸⁰ “Akten sind bei der Untersuchung politischer Vorgänge ein besonders wichtiges Beweismittel. Sie haben gegenüber Zeugenaussagen in der Regel einen höheren Beweiswert, weil das Gedächtnis von Zeugen aus mancherlei Hinsicht unergiebig werden kann.” (Translation mine). *Untersuchungsausschuss Geheimgefängnisse*, *supra* note 126 at 113; *Flick-Untersuchungsausschuss*, *supra* note 128 at 132; *Neue Heimat*, BVerfGE 77, 1 at 48.

⁶⁸¹ According to his/her competence, Art. 65 of the *Basic Law*.

disclosure is subject to the general limitations and to restrictions such as competency, core area of executive autonomy, welfare of the state as well as protection of secrets and fundamental rights of third parties. However, in the words of the Constitutional Court,

The importance of Parliament's right of scrutiny, both for parliamentary democracy and for the prestige of the state, does not generally allow a shortening of the claim to the issuing of files in the interests of the protection of the general right of privacy and the protection of property if parliament and government have made provisions for the protection of secrets that ensure the undisturbed co-operation between the two constitutional bodies in this field and if the principle of proportionality is respected.⁶⁸²

From the perspective of the German Constitutional Court, the provisions of *Bill C-22* that result in the Committee lacking the right to demand and receive files would thus be considered too limited in terms of access to information. Another power of the control bodies would be the right to subpoena witnesses. Again, the right was not adopted in *Bill C-22* at the report stage. The PKGr may question employees or personnel of the agencies or the government—these are, however, not witnesses in the sense of the *Criminal Procedure Code* (*Strafprozessordnung*, “*StPO*”) and the *Commission of Inquiry Act* (*Untersuchungsausschussgesetz*, “*PUAG*”), which refers to the *StPO*. Thus, the people who are being heard by the PKGr are not criminally liable for false testimonies. An authorised expert of the Panel had especially called for a new provision that would refer to the *StPO* in terms of the hearing of evidence in the PKGr, but this proposal was not acted upon.⁶⁸³ Some critics are, however, against the application of the *StPO*. In Germany, increasing the powers of the Panel to the extent of the powers of a Committee of Inquiry (that does refer to the *StPO*) would contradict the principle of the separation of powers, as the Committee of Inquiry is only granted those special powers because they are “limited thematically and in time.”⁶⁸⁴

History has, however, shown the Panel’s weakness of not being able to compel the “witnesses” to tell the truth or sanction them through criminal law proceedings (only through disciplinary penalties),⁶⁸⁵ a fact that a former member of the PKGr (of the parliamentary group Die Linke) and former judge at the Federal Court of Justice in Germany (Nešković) called a “licence to lie”.⁶⁸⁶ If *Bill C-22* was to be amended again with a right to subpoena witnesses, to bypass this “licence to lie”, one might thus argue in line with Nešković that the right should contain criminal law sanctions in order to be effective and truly increase the actual level of information.

⁶⁸² “Die Bedeutung, die das Kontrollrecht des Parlaments sowohl für die parlamentarische Demokratie als auch für das Ansehen des Staates hat, gestattet in der Regel dann keine Verkürzung des Aktenherausgabeanspruchs zugunsten des Schutzes des allgemeinen Persönlichkeitsrechts und des Eigentumsschutzes, wenn Parlament und Regierung Vorkehrungen für den Geheimschutz getroffen haben, die das ungestörte Zusammenwirken beider Verfassungsorgane auf diesem Gebiete gewährleisten, und wenn der Grundsatz der Verhältnismäßigkeit gewahrt ist.” (Translation mine). *Flick-Untersuchungsausschuss*, *supra* note 128, headnote 5c).

⁶⁸³ BT-Drucksache 16/7540, *supra* note 351 at 179, cited in Singer, *supra* note 38 at 105.

⁶⁸⁴ “thematisch und zeitlich begrenzt” (Translation mine). Peitsch & Polzin, *supra* note 132 at 391.

⁶⁸⁵ Markus C. Schulte von Drach, “Mit der Lizenz zum Lügen” (Interview with Wolfgang Nešković), *Süddeutsche Zeitung* (28 April 2015), online: <www.sueddeutsche.de/politik/bnd-affaere-mit-der-lizenz-zum-luegen-1.2455346>.

⁶⁸⁶ “Lizenz zum Lügen” (Translation mine). Gerd Breker, “Ein klarer Gesetzesverstoß durch den BND” (Interview with Wolfgang Nešković), *Deutschlandfunk* (24 April 2015), online: <www.deutschlandfunk.de/koooperation-mit-der-nsa-ein-klarer-gesetzesverstoess-durch.694.de.html?dram:article_id=318045&dram:audio_id=362303&dram:play=1>.

As mentioned, since 2009, the PKGr has also been allowed to make use of its right of access to the premises of the agencies. Again, a similar approach was not taken in Canada. Therefore, one might argue that it will be difficult for the Canadian Committee to have access to sufficient information. The Committee does not have any powers to get information on its own initiative without having to consult the government and request it from it. According to Singer, those “self-information rights” are a “prerequisite for effective parliamentary control of intelligence activities.”⁶⁸⁷ Seen from this perspective, the new Canadian Committee will very likely not succeed in effectively controlling the government in the realm of national security.

This is surprising as the question of having sufficient access to information has been dealt with before in Canada. One of those situations was the already mentioned: the ‘Afghan detainee’ case that led the former Speaker of the House, Peter Milliken, to give a speech on the importance of parliamentary privilege and access to information. However, the effect of the speaker’s ruling was quite the opposite of a strengthened Parliament in Canada. Unlike the NDP, the Liberal Party as well as the Bloc Québécois (both in the opposition to the Harper government back in 2010) agreed that the government should still have the power to withhold the documents because of Cabinet confidence as well as solicitor-client privileges. The panel, made up of MPs of the Liberals, the Bloc Québécois and the Conservatives, was not granted full access to the documents that the parliamentarians might have needed to assess the Canadian officials’ role and their knowledge of torture of transferred Afghan detainees.⁶⁸⁸ Because of several new allegations of torture as well as the fact that the whole ‘scandal’ has not been properly investigated, especially because of the withholding of information, the NDP is still pressing for a public inquiry into the matter.⁶⁸⁹ One may therefore argue that the right to get wide access to information is indispensable for any kind of (parliamentary) control. It is, however, easy for the government to accept that claim and nevertheless argue for limitations to that kind of information or, with justifications, for not being able to disclose this information—and thereby, possibly also to prevent the revelation of compromising material.

The German Constitutional Court has also dealt with the problem of vague legal terms (“unbestimmte Rechtsbegriffe”) used as a broad justification for a limitation to the access to information. In one case, ruling on the importance of parliamentary control (in this case regarding a committee of inquiry), the government had withheld information from the committee, justifying it with the importance of national security, the core area of executive autonomy and internal decision-making (“interne Willensbildung”). The Court ruled that it was not sufficient to only broadly rely on

⁶⁸⁷ “[...] Selbstinformationsrechte; unverzichtbare Voraussetzung für eine effektive parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit.” (Translation mine). Singer, *supra* note 38 at 99.

⁶⁸⁸ “Afghan detainee panel a ‘charade’: NDP”, *CBC news* (09 December 2010), online: <https://ca.news.yahoo.com/afghan-detainee-panel-charade-ndp.html>.

⁶⁸⁹ Amanda Connolly, “NDP renews call for inquiry into Afghan detainee abuses”, *ipolitics*, online: <https://ipolitics.ca/2016/06/15/ndp-renew-call-for-inquiry-into-afghan-detainee-abuse/>.

notions such as core area of executive autonomy. Instead, there needed to be a balance between those secrecy interests and the interest of the Parliament to get access to information. Particularly in the case of completed operations, the parliamentary claim to information weighed heavily, even in areas of internal decision-making of the government. In the eyes of the Court, a detailed and in-depth explanation of the reasons was needed to withhold any information from Parliament.⁶⁹⁰

In Germany, the problem of vague legal terms does not only exist with regards to possible limitations to the access to information but also, in the first place, with regards to the obligation to share information. One of those vague terms is, for example, the term “occurrences of special importance”. Wetzling argues that “[i]f the Federal Government's obligations to inform the Panel remain so vaguely conceptualised, this allows for the maintenance of areas free of control.”⁶⁹¹ A positive effect of those broad terms may, however, be their complete reviewability before the courts. One needs to remember though that going to court is always a long process; during that time, the government does have the right to rely on its subjective interpretation of the broad terms in the specific situation. Another positive effect of the vague terms such as core area of executive autonomy and the welfare of the state may be that they are not too rigid, making it possible to balance security interests with the interest of publicity and claims to get access to information.

As for the Canadian current version of *Bill C-22*, the bill does, for example, not define what a formula such as “injurious to national security” in, for example, s 16 (refusal of information) exactly means and implies. One may therefore argue that the danger of “areas free of control” might indeed also exist here. What is particularly alarming when it comes to those broad legal terms in Canada is that the Committee would not be allowed to go to Court against the government's decisions of non-disclosure and the application of those concepts.

Furthermore, the new Committee may very well not be able to oversee a situation for as long as the government would consider it as “ongoing” and “injurious”. A case such as the Afghan detainee-case could then possibly not be reviewed since at that time the deployment of Canadian soldiers in Afghanistan was still ongoing. In addition, renditions such as in the Arar case and, for example, interrogations of prisoners, for example, Omar Khadr in Guantanamo, may indeed also be labelled as non-disclosable due to close international ties, and their investigation may be presented as a danger to national security. The major scandals of the past would probably not have been reviewed if the new Committee had already existed.

⁶⁹⁰ *BND-Untersuchungsausschuss*, BVerfG, Beschluss des Zweiten Senats vom 17. Juni 2009 - 2 BvE 3/07.

⁶⁹¹ “Wenn die Unterrichtungspflichten der Bundesregierung gegenüber dem Gremium weiter so vage gefasst bleiben, ermöglicht dies das Beibehalten kontrollfreier Räume.” (Translation mine). Thorsten Wetzling, *Aufklärung ohne Aufsicht – Über die Leistungsfähigkeit der Nachrichtendienstkontrolle in Deutschland* (Berlin: Heinrich-Böll-Stiftung, 2016) at 22, online: <https://www.boell.de/sites/default/files/aufklaerung-ohne-aufsicht.pdf>.

To elaborate further on the implications of the new “globalised intelligence”, one may return to one of the major decisions of the Constitutional Court in Germany mentioned in chapter 1, the NSA selectors list decision. It allowed the government to withhold the selectors lists from the Committee of Inquiry. It may be one of the best examples for the difficulties to find the ‘right’ balance between the government’s interest in secrecy and the parliament’s interest in effective control—with both government and parliament invoking the welfare of the state. The judgement of the Court emphasised that in the case of a full disclosure of the lists, the United States might not be as willing as before to cooperate with the German intelligence services, which might lead to a threat to the security of the German state. In times of increasing intelligence-sharing between states, the reference to foreign intelligence services and collaboration agreements makes it very difficult to have any kind of effective control in the sense of allowing parliamentarians of either of the respective control panels or committees of inquiry the access to information necessary for even conducting that control. This is problematic because those control bodies were precisely established to make it possible to disclose information to parliamentarians. Indeed, even the fact that not all parliamentarians are granted access, always constitutes a limitation to the “principle of public access to information, the right of deputies to formal equality and the right to effective protection of the rights of the persons affected.”⁶⁹² The limitations to the access to information therefore “must be handled restrictively”.⁶⁹³ Nees, who wrote an article on the selectors lists before the judgement of the Court was released, came to a conclusion contrary to that of the Court, arguing that it was dangerous to acquit the government “of any parliamentary control by means of a simple reference to cooperation with another intelligence agency.”⁶⁹⁴ Whitaker remarks that it was alarming that intelligence agencies might indeed share information internationally to an extent that no review body may be able to hold them accountable as those bodies are bound to the national sphere.⁶⁹⁵ Therefore, the agencies may bypass control by collaboration, willingly (“information laundering”)⁶⁹⁶ or coincidentally. Whitaker mentions the Arar case in Canada as an example; the El-Masri Commission of Inquiry in Germany may very well be mentioned as another example.

With respect to *Bill C-22*, it becomes apparent that international relations are only mentioned once in the bill in s 21 on the annual report. However, due to the broad veto power of the minister to the Committee’s mandate (“injurious to national security”), it will be easy to argue that any information that might be problematic because of the allies’ intelligence and secret services’ interests cannot be part of the Committee’s mandate (see above). Therefore, the vague legal terms may also make it difficult here to close accountability gaps. In view of the fact that firstly, the

⁶⁹² “[...] Öffentlichkeitsprinzip, dem Recht der Abgeordneten auf formale Gleichheit und dem Recht auf effektiven Rechtsschutz der Betroffenen.” (Translation mine). Nees, *supra* note 22 at 680.

⁶⁹³ “[...] müssen restriktiv gehandhabt werden.” (Translation mine). *Ibid* at 680.

⁶⁹⁴ “[...] mittels eines einfachen Verweises auf die Kooperation mit einem anderen Geheimdienst von jeglicher parlamentarischer[n] Kontrolle frei[z]uzeichnen.” (Translation mine). *Ibid* at 680.

⁶⁹⁵ Reg Whitaker, “The Failure of Official Accountability and the Rise of Guerilla Accountability” in Michael Geist, ed, *Law, Privacy and Surveillance in the Post-Snowden Era* (Ottawa: University of Ottawa Press, 2015) at 211-214 [Whitaker, “Guerilla”].

⁶⁹⁶ *Ibid* at 215

activities of the BND, although illegal, would be considered as ongoing and, secondly, that the US have their own interest in the secrecy of the lists there is much to suggest that a similar case in Canada would be decided in the same way as in Germany (plus, the Committee would not even have the right to go to Court against the government's decision of non-disclosure). From Nees' perspective, this means that there will be big accountability gaps in Canada at the discretion of the government that may very easily stop parliamentary control from happening. Furthermore, in Canada, there may be a lot more *official* collaboration with foreign intelligence services due to the country's membership in the Five Eyes. So, the danger of misusing and bypassing the national limitations as well as control mechanisms may even be greater in Canada. A reference to the Five Eyes agreements and thus international cooperation as well as the dependence of the relatively small Canadian agencies on their "big" partners, particularly the US, may be considered sufficient grounds to withhold certain if not most of the information necessary to evaluate the activities of the agencies and the government.

So far, I have talked about the problem of vague legal concepts/terms and international cooperation and their connection to the limitations to access to information. Whitaker defines two more basic categories of secret information that need to be re-evaluated; not in a way that abolishes one of the categories but in a way that redefines the interpretation of the following rules, "[n]o disclosure of the identification of secret sources of intelligence [and] [n]o disclosure of methods and techniques of covert operations."⁶⁹⁷ He argues that rule one is "interpreted in a manner so expansive as to lose much of its legitimate force", making "*public* accountability [...] impossible"⁶⁹⁸; in Whitaker's view, the same is true for rule two, where he takes as an example the Maher Arar inquiry, by also referring to a Federal Court judgement where the Court—after the government had wanted to not disclose most of the report—declassified most of the information that the Inquiry sought to disclose.⁶⁹⁹ The judgement should also be kept in mind when evaluating the sections on the annual report of the NSICP (see below).

Back to the selectors lists in Germany. Since the committee of inquiry was not granted access by the government, a compromise was found and a so-called Independent Counsel or Special Agent (*Sonderermittler*) was asked to consider the lists and report on them (in a rather broad sense). In this case, Kurt Graulich, a former judge of the Federal Administrative Court was chosen. He has been assessed critically, not the least because he was indeed paid and "appointed" by the government, although he was working "on the authority" of the committee of inquiry.⁷⁰⁰ In 2015,

⁶⁹⁷ *Ibid* at 211.

⁶⁹⁸ Whitaker, "Guerilla", *supra* note 695 at 211.

⁶⁹⁹ *Ibid* at 212, referring to *Attorney General of Canada v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, *Federal Court of Canada*, 2007 FC 766, 24 July 2007.

⁷⁰⁰ Thorsten Denkler, "Zweifel an der Unabhängigkeit", *Süddeutsche Zeitung* (04 November 2015), online: www.sueddeutsche.de/politik/nsa-zweifel-an-der-unabhaengigkeit-1.2722406.

the *Süddeutsche Zeitung* reported that Graulich had (more or less literally) copied big parts of the BND's own assessment including legal evaluations for his own assessment for the committee.⁷⁰¹ He was later questioned by the committee of inquiry. Furthermore, he was criticised for his lack of technical knowledge and consequential "misjudgements".⁷⁰²

The appointment of an expert is also possible in the *PKGr Act*. According to § 7, the Panel may with a "majority of two-thirds of its members and after consulting the Federal Government, commission an expert to carry out investigations in order to exercise its control."⁷⁰³ His/her specific rights are mentioned in chapter 1. More important at this stage is that the right to "commission an expert" is another "possibility of self-information" and "of making the work [of the Panel] easier and more effective."⁷⁰⁴ The Panel itself publicly reported it had made use of its right for the first time: "The appointment of an expert has proved to be a particularly effective control instrument with which a constructive and relevant result can be achieved in a relatively short time. The extensive report provides the Panel with a lot of important insights for its further control activity beyond the actual facts."⁷⁰⁵

The Canadian *Bill C-22* does not provide for a commissioning of an expert in a specific matter. It has, however, in s 29 the following clause: "The executive director may enter into contracts, memoranda of understanding or other arrangements, including contracts to engage the services of legal counsel or other persons having professional, technical or specialized knowledge to advise or assist the Committee or any of its members."⁷⁰⁶ This provision may help the Committee to increase its understanding of specific questions. However, it will not lead to the same degree of facilitation as the possibility to authorise an expert to conduct a proper investigation into a matter instead of focusing on specific, for example, legal questions. Once again, the rights to self-information of the Committee still lag behind what is possible. The introduction of an expert might have helped the Committee to cope with the amount of information it will receive due to its broad mandate.

Another idea for how to relieve the Panel and deal with the dilemma of, on the one hand, granting the access to information to parliamentarians and, on the other hand, preventing the danger of leaked information is the new

⁷⁰¹ *Ibid.*

⁷⁰² Anna Biselli, "IMSI, IMEI, SIP: Selektoren-Gutachter Graulich verheddert sich im Technik-Dschungel", *netzpolitik.org* (04 November 2015), online: <https://netzpolitik.org/2015/imsi-imei-sip-selektoren-gutachter-graulich-verheddert-sich-im-technik-dschungel/>.

⁷⁰³ "[...] Mehrheit von zwei Dritteln seiner Mitglieder nach Anhörung der Bundesregierung im Einzelfall einen Sachverständigen beauftragen, zur Wahrnehmung seiner Kontrollaufgaben Untersuchungen durchzuführen." (Translation mine). § 7 *PKGr Act* 2016.

⁷⁰⁴ "[...] Möglichkeit zur Selbstinformation; Erleichterung und Effektivierung [der] Arbeit [des Gremiums]." (Translation mine). Singer, *supra* note 38 at 130-131.

⁷⁰⁵ "Die Beauftragung eines Sachverständigen hat sich dabei als ein besonders effektives Kontrollinstrument bewährt, mit dem in relativ kurzer Zeit ein konstruktives und sachdienliches Ergebnis erzielt werden kann. Der umfangreiche Bericht ermöglicht dem Gremium über den eigentlichen Sachverhalt hinaus viele wichtige Erkenntnisse für seine weitere Kontrolltätigkeit." (Translation mine). Germany, Deutscher Bundestag, *Unterrichtung durch das Parlamentarische Kontrollgremium*, 15 Parl, BT-Drucksache 15/5989 (8 September 2005) at 7 [BT-Drucksache 15/5989].

⁷⁰⁶ *Bill C-22* (final version).

position of the so-called Permanent Representative. The office was introduced in Germany to deal with the mentioned tension. He/she is somehow thought to execute “regular and case-specific investigations” and to “prepare the meetings of the Parliamentary Control Panel and its reports to the plenum of the German Bundestag. He or she regularly attends the meetings of the Parliamentary Control Panel, the G10 Commission and of the Parliamentary Trust Body.”⁷⁰⁷ It will be interesting to see which tasks the new office is going to take over. On the one hand, the establishment of this office might be a helpful link between Executive and Parliament, increasing the Executive’s willingness to share information, decreasing the chance of possible leaks. There are, however, several questions to ask: Is one single person (even assuming a large staff) enough to deal with such an amount of data, such significant information and its possible implications? Will he/she see his/her role in supporting the Panel or will he/she be under too much influence of the secret services, in the end being an “agent” of the Executive? Will there not be a massive concentration of power in the hand of this one single person only, a person, by the way, who is not elected and thus not directly democratically legitimised? Will the execution of rights of the Panel itself actually shrink? It is interesting that in 2009, even the CDU/CSU, which has now proposed the position of a Permanent Representative and voted in favour of the new office, expressed the following doubts in a bill concerning the establishment of a Representative for the National Security Agencies (and/or the introduction of an independent new control body): “This would give up the existing, well-balanced system without reaching a recognisable gain. The Bundestag would thereby dispose of its own fundamental parliamentary tasks by delegating parts of its control functions to quasi-autonomous supervisory bodies outside Parliament.”⁷⁰⁸ Thus, the Office has yet to show its effectiveness as well as its integration into the Panel’s and the Parliament’s work before one could make a recommendation for the Canadian system including a recommendation that would relate the Permanent Representative’s role to the proposal in Canada at several points in time for some kind of Officer of Parliament to be added to the control scheme. In the first report of the PKGr after the Permanent Representative had investigated possible mistakes of the services concerning the terror attack in Berlin in December 2016, PKGr member Hahn wrote in a dissenting opinion: “The wording [contained in the Public Assessment of the Permanent Representative] ‘The work of the Permanent Representative was monitored by the following MPs: Schuster, Grötsch, Dr. Hahn and Ströbele’ is indicative of the problematic functioning of the Panel. The fact is that the Permanent Representative has consulted various persons concerned with the Amri case. Minutes

⁷⁰⁷ “[...] regelmäßige und einzelfallbezogene Untersuchungen; bereitet die Sitzungen des Parlamentarischen Kontrollgremiums und dessen Berichte an das Plenum des Deutschen Bundestages vor. Sie oder er nimmt regelmäßig an den Sitzungen des Parlamentarischen Kontrollgremiums, der Kommission nach dem Artikel 10-Gesetz und des Vertrauensgremiums nach § 10a der Bundeshaushaltsordnung teil.” (Translation mine). § 5a of the *PKGr Act* 2016.

⁷⁰⁸ “Hierdurch würde das bestehende, gut austarierte System aufgegeben, ohne einen erkennbaren Mehrgewinn zu erreichen. Der Bundestag würde sich dadurch zudem ureigenster parlamentarischer Aufgaben entledigen, indem er Teile seiner Kontrollfunktionen an quasi autonome Kontrollinstanzen außerhalb des Parlaments delegiert.” (Translation mine). Germany, Deutscher Bundestag, *Entwurf eines Gesetzes zur Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*, 16th Parl, BT-Drucksache 16/12411 (24 March 2009) at 2 [BT-Drucksache 16/12411].

or at least summaries of these interviews were never presented to the MPs. [...].”⁷⁰⁹ If his assessment is correct, it might be doubtful that the Office—at least in its current form—should be considered a positive example of *parliamentary* control.

Before the establishment of the Permanent Representative, Holzner had already suggested that in order to manage the risk of having a Representative who takes on the role of the Parliament, he/she should be a Member of Parliament himself/herself—“belonging to one of the opposition parties”.⁷¹⁰ This proposal might indeed help to increase his/her democratic legitimacy. But once again—as for the Panel or the Canadian Committee—we would need rules on how and particularly by whom this person should be elected. In Germany, where the so-called “big coalitions” are forming the government and where therefore the opposition is very small—with currently two opposition parties—it would come as a surprise if the big parties would be willing to grant the position of a Permanent Representative to a member of the opposition parties—currently Bündnis90/Die Grünen and Die Linke (which had itself been under observation by the secret services for a long time). With the possibility of a new right-wing party in Parliament after the election in September 2017, there will probably be even more arguments against an election of the Representative amongst the opposition parties’ members.

Holzner also mentions another possible procedure for Germany (with regards to Committees of Inquiries though), the so-called “Chair-procedure” (*Vorsitzenden-Verfahren*). If the government does not want to disclose certain information, “the refused information [in the article on grounds of the welfare of the state] should be made available to the chair and his deputy so that they can convince themselves that the refusal is lawful.”⁷¹¹ The positive effect would be that Parliament may at least somehow control “the decision of the government on the disclosure of information”, either only by being able to find out whether they agree with the government on the necessary secrecy of the information or by actually having the right to use the information in the work of the committee⁷¹² (Panel).

Since the establishment of the Office of the Permanent Representative has created a lot of criticism, particularly from the opposition parties, its activities and influence need to be observed in the nearby future in order to be able to assess whether the introduction of a similar office would make sense in Canada. It might be a relief on the Panel’s

⁷⁰⁹ “Die [in der Öffentlichen Bewertung des Permanent Representative enthaltene] Formulierung „Die Arbeit des Ständigen Bevollmächtigten wurde von den Abgeordneten Schuster, Grötsch, Dr. Hahn und Ströbele begleitet“ ist bezeichnend für die problematische Arbeitsweise des Gremiums. Fakt ist: Der Ständige Bevollmächtigte hat diverse mit dem Fall Amri befasste Personen befragt. Protokolle oder zumindest Zusammenfassungen dieser Befragungen wurden den Abgeordneten niemals vorgelegt. [...]” (Translation mine). Germany, Deutscher Bundestag, *Unterrichtung durch das Parlamentarische Kontrollgremium [im Fall Anis Amri]*, 18 Parl, BT-Drucksache 18/12585 (31 May 2017) at 22 (preliminary version of report) [BT-Drucksache 18/12585].

⁷¹⁰ Thomas Holzner, “Parlamentarische Informationsansprüche im Spannungsfeld zwischen demokratischer Kontrolle und Staatswohlinteressen” (2016) DÖV 688.

⁷¹¹ “[...] sollen dem Vorsitzenden und seinem Stellvertreter die verweigerten Informationen [im Artikel aus Gründen des Staatswohls] zugänglich gemacht werden, damit diese sich davon überzeugen können, dass die Verweigerung rechtmäßig ist.” (Translation mine). *Ibid* at 673.

⁷¹² “[...] die Entscheidung der Regierung über die Preisgabe von Informationen.” (Translation mine). *Ibid*.

workload in Germany and also on that of the Committee in Canada, if it indeed does not decrease the level of democratic legitimacy by “undermining” the rights of the Panel.

The Chair-procedure (*Vorsitzenden-Verfahren*) might indeed be another possible solution. It is, however, doubtful that a parliament with a strong government would introduce such a provision if members of the opposition held either the chair or the vice-chair. If, however, the chair was from the government party, the possible advantage of this procedure would probably be illusory since no independence would be guaranteed at all. Thus, the chair and the vice-chair would possibly have to come from both the governmental party and the opposition. Again, this might lead to the problem of having a political stalemate to which a new and effective solution would have to be found.

As regards access to information, the last issue that needs to be addressed becomes apparent if one recalls the criticism directed at the expert Graulich in Germany that he lacked the necessary knowledge and expertise to understand the technical problems connected with the NSA selectors list correctly. Indeed, the pure access to information is not the only thing that matters; it is also of great significance that the parliamentarians are able to understand the information correctly. Therefore, Hirsch concluded in 1996 that it should be possible for the Panel to consult experts in certain contexts, a fact that *Bill C-22* provides for when it allows the Executive Director of the Secretariat to, for example, consult experts. For example, the expedience of the activities of the secret and intelligence services is difficult to assess by a control body if it does not have access to experts’ assessments and opinions on these matters.⁷¹³ Understanding information correctly or not is, however, not only an issue in cases of legal or technical problems. It may also be difficult to understand information correctly if the motivation behind certain decisions, the analysis of arguments or, for example, the fact that there was no other possible way to act in certain situations, do not come with it.

In Germany, due to the core area of executive autonomy, the Bundestag has a right to ask questions in any matter; it does, however, not have the right to information concerning the “[d]eliberations and decision-making process”⁷¹⁴ of the government. Nevertheless, it is not only difficult to understand the amount of (in our digital times, highly technical) information in general, it is—as just mentioned—also difficult for a committee or panel to understand the government’s decisions and activities without being informed about the reasons why it decided to act in a certain way. The motives behind decisions might have a greater influence on the ability to understand information (correctly) than any knowledge or guidance of experts, who—in those cases—are often as in the dark as the parliamentarians of the panel. Section 14 of *Bill C-22* excludes, inter alia, Cabinet confidences from the Committee’s right to get access to information. Cabinet confidences are considered confidential and important because “[i]n order to reach final

⁷¹³ Dietrich, *supra* note 368 at 206.

⁷¹⁴ *Rüstungsexport*, *supra* note 178 headnote 2a.

decisions, ministers must be able to express their views freely during the discussions held in Cabinet. To allow the exchange of views to be disclosed publicly would result in the erosion of the collective responsibility of ministers.”⁷¹⁵ The understanding of Cabinet confidences is therefore comparable to the core area of executive autonomy that protects the freedom to form an opinion. Therefore, the same problems may arise for the Committee when trying to fully understand the information provided by the government. There is probably no way to tackle this problem without interfering with the current understanding of the separation of powers and the responsibility of the government for its activities in either of the two countries. Concluding this paragraph on access to information, one may argue that the Canadian Committee lags behind when it comes to rights to self-information and might have problems when trying to not be fully dependent upon the ones who are the objects of control.

III. Information to the Public

The following paragraph will assess rights of the Panel and the Committee that are not directly connected to the access of information and have thus not been discussed above. They are, however, concerned with increasing the transparency of the review and thus, democratic legitimacy.

1. Dissenting Opinion (*Sondervotum*) in Special Reports

According to § 10 I of the *PKGr Act 2016*, “the discussions of the Parliamentary Control Panel are confidential.”⁷¹⁶ However, according to § 10 II of the same Act, “Paragraph 1 shall not apply to assessments of certain transactions where a majority of two-thirds of the members of the Parliamentary Control Panel present have given their prior consent. In this case, each individual member of the Panel is allowed to publish a dissenting opinion (special vote).”⁷¹⁷ This right may be considered as a particularly important right for the opposition or individual parliamentarians of the PKGr (see below). It is, however, already restricted by the high quorum that needs to vote in favour of giving a briefing according to § 10 II *PKGr Act*. Furthermore, although it is not stated in the Act itself, the implementation of this right states that the parliamentarian who wants to give a dissenting opinion has to “submit (that opinion) to the Panel before publication for scrutiny” which then publishes it.⁷¹⁸ Singer critically assesses this procedure as “constitutionally problematic with regard to [...] the constitutional rights of a free and independent Member of Parliament [...]”.⁷¹⁹

⁷¹⁵ Canada, Confidences of the Queen’s Privy Council for Canada, online: <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html>.

⁷¹⁶ “Die Beratungen des Parlamentarischen Kontrollgremiums sind geheim.” (Translation mine). *PKGr Act 2016*.

⁷¹⁷ “Absatz 1 gilt nicht für Bewertungen bestimmter Vorgänge, wenn eine Mehrheit von zwei Dritteln der anwesenden Mitglieder des Parlamentarischen Kontrollgremiums ihre vorherige Zustimmung erteilt hat. In diesem Fall ist es jedem einzelnen Mitglied des Gremiums erlaubt, eine abweichende Bewertung (Sondervotum) zu veröffentlichen.” (Translation mine). *Ibid.*

⁷¹⁸ “[...] dem Gremium vor Veröffentlichung zur Prüfung vor[zulegen].” (Translation mine). Singer, *supra* note 38 at 159.

⁷¹⁹ “[...] mit Blick auf [...] die statuierten Rechte eines freien und unabhängigen Abgeordneten [...] verfassungsrechtlich problematisch.” (Translation mine). *Ibid.*

Several dissenting opinions have been published so far, the latest being the above-mentioned one of Hahn, a member of the PKGr (Die Linke), who criticised the report of the Permanent Representative as well as the briefing of the PKGr on the potential mistakes made by the secret services in the case of Anis Amri, the assassin in the attack on a Christmas market in Berlin in December 2016. (Hahn criticised the incompleteness of information, the lack of documents that were handed over to the Panel as well as the high degree of sympathy of the Panel with the services).⁷²⁰ Whereas the Canadian *Bill C-22* does refer to so-called special reports that may be conducted (s 21 (2)), it does not include the right for anyone to publish a dissenting opinion, either in such a report or exclusively. This will be further discussed in the paragraph on the annual report.

2. (Bi-) Annual Reports

The German Panel tables a report in Parliament at least every two years (in the middle and at the end of each legislative period).⁷²¹ In those reports, the Panel does also report on the fulfilment of the government's obligations vis-à-vis the Panel. However, the Law does not provide for dissenting opinions such as in the special reports according to § 10 II of the *PKGr Act* (they are, however, also not prohibited). Singer argues that “especially [...] minority votes would be desirable in terms of legal policy, for it is hardly to be expected by the opposition members in the Panel to go along with a public statement which they have resisted on the committee. In this respect ‘equality of arms’ is urgently required, especially since aspects of confidentiality do not necessarily require unanimity.”⁷²²

In Canada, the Committee will write a report every year. *Bill C-22* also lists the minimum content of such a report, thereby possibly enhancing its meaning and significance. *Bill C-22* does also not include any rights of opposition members to give dissenting opinions—neither in the special nor in the annual reports. The arguments of Singer are, however, globally applicable. If one looks at the content that a report must contain, *Bill C-22* also lists headings such as “findings” and “recommendations”. Both keywords may provide for new reforms and ideas or for public pressure if all members (also those of the opposition) could include their (potentially helpful) findings or recommendations. Since the Committee consists of parliamentarians of different parliamentary groups, dissenting opinions of (opposition) members would be very interesting for voters who do not agree with the majority view. However, it does also help to see reports without dissenting opinions; this would increase the public effect of the Committee's decisions or findings.

⁷²⁰ Germany, Deutscher Bundestag, Parlamentarisches Kontrollgremium, *Erläuternde Sachverhaltsdarstellung zur öffentlichen Bewertung des Parlamentarischen Kontrollgremiums nach § 10 Absatz 2 des Kontrollgremiumsgesetzes zum Fall Anis Amri vom 29. März 2017*, 18 Parl, BT-Drucksache 18/12585 (31 March 2017) (preliminary version of report).

⁷²¹ § 13 of the *PKGr Act 2016*.

⁷²² “Gerade [...] Minderheitenvoten wären rechtspolitisch wünschenswert, denn es ist den oppositionellen Mitgliedern im Gremium kaum zuzumuten, eine öffentliche Stellungnahme mitzutragen, gegen die sie sich im Gremium gewehrt haben. Hier ist ‚Waffengleichheit‘ dringend erforderlich, zumal Gesichtspunkte des Geheimschutzes eine einstimmige Stellungnahme nicht zwingend erfordern.” (Translation mine). Singer, *supra* note 38 at 178.

In the final version of *Bill C-22*, each annual report must be handed over to the Prime Minister first, who may (after “consulting the Chair of the Committee”) request a revised version of the report if he holds it to be necessary because of secret information included in the report. The reasons brought forward by the Prime Minister may again include examples of very broad and vague legal concepts/terms that can easily be misused (“injurious to national security, national defence or international relations [...]”).⁷²³ To support this claim, one may cite Whitaker, who remarked (not with respect to *Bill C-22* but in general), “[o]fficial review bodies, always concerned about their ongoing working relationship with the agencies they review and deeply concerned to maintain their own legitimacy as placers in the national security world, rarely contest the application of the government’s expansive interpretation of non-disclosure in public reports of information deemed to fall under national security confidentiality.”⁷²⁴ The report of the Committee may therefore not be considered as a tool effective enough to sufficiently inform the public. The criticism that a “censored” report may diminish transparency, democratic legitimacy as well as public trust in the Committee’s work has already been addressed at length in the paragraph on the parliamentary debates on *Bill C-22* and will not be further discussed at this point. It remains to be explained, however, why there are no opposition rights or rights for any parliamentarian in the Committee to give a dissenting vote if the Prime Minister decided that a report included secret information and requested a revision.

Borg-Maciejewski postulated that the Panel should publish “success stories” of the intelligence agencies to “build up trust of the citizens” in those institutions⁷²⁵ (the importance thereof is given in detail below). Through the annual reports, the parliamentary control bodies may help to increase the reputation of the intelligence services. This possible content is generally not part of the German reports, neither is it mentioned as mandatory in *Bill C-22*. The function of a control body is, however, indeed not to support the good reputation of the institutions to be controlled. The bodies would become involved in unnecessary sideline activities.

3. Annual Public Official Hearings

In the last reform of the *PKGr Act*, an annual public official hearing of the heads of the secret services was introduced as a new right of the Panel,⁷²⁶ similar to the US, where the fact that the director of national intelligence lied to Congress was one of the triggers for the revelations of Snowden.⁷²⁷ However, so far, the right has not been implemented.

⁷²³ S 21 (5) of *Bill C-22* (final version).

⁷²⁴ Whitaker, “Guerilla”, *supra* note 695 at 213.

⁷²⁵ Borgs-Maciejewski, *supra* note 34 at 43.

⁷²⁶ § 10 III of the *PKGr Act 2016*.

⁷²⁷ Brian Fung, “Darrell Issa: James Clapper lied to Congress about NSA and should be fired”, *Washington Post* (27 January 2014), online: https://www.washingtonpost.com/news/the-switch/wp/2014/01/27/darrell-issa-james-clapper-lied-to-congress-about-nsa-and-should-be-fired/?utm_term=.8eebc4a29be0, cited in Andre Meister, “Große Koalition verhindert öffentliche Befragung der Geheimdienst-Chefs vor der Bundestagswahl”, *netzpolitik.org* (31 March 2017), online: <https://netzpolitik.org/2017/grosse-koalition-verhindert-oeffentliche-befragung-der-geheimdienst-chefs-vor-der-bundestagswahl/>.

Despite protests from the opposition members of the PKGr and of the Bundestag, the first hearing will most likely take place after the next general elections in September 2017.⁷²⁸ Since there is a high probability that not all members of the current PKGr will be elected as members for the next PKGr (Hans-Christian Ströbele, for example, the PKGr member of Bündnis 90/Die Grünen will not run for election to the Bundestag again), the chance that well-informed parliamentarians may question the presidents in an effective way is quite limited. This is also due to the fact that the new members of the PKGr will not be able to read reports or watch debates of the PKGr's current sessions, as no kind of record keeping takes place. It may also be taken as an example of partisan acts of the Executive (see below). Nonetheless, the right to publicly hold a meeting and question the presidents of the secret services might help to increase public interest in the Panel's (GER) or Committee's (CA) work. Since the hearings are publicly recorded, this may also be used as a right to sanction the presidents in a certain way by publicly criticising their actions.

Bill C-22 does not provide for a hearing of the presidents of the secret services or ministers. It does, however, also not regulate that *all* meetings of the Committee need to be held in private. Section 18 reads: "Meetings of the Committee are to be held in private if any information that a department is taking measures to protect is likely to be disclosed during the course of the meeting or if the Chair considers it to be otherwise necessary."⁷²⁹ Whereas most of the meetings will probably be held in private (with good reasons), it is nevertheless possible to meet in public—possibly also in order to increase pressure upon the actors in the realm of national security.

IV. Digital World

In 2016, and before *Bill C-22* was discussed in Parliament, Roy harshly criticised the non-existence of an effective parliamentary control of the security agencies in Canada in an article.⁷³⁰ He particularly discussed the changes that needed to be made in the debate on privacy and national security in the light of the technological developments of the last years. He wrote,

[...] the virtualization of security activity massively expands the potential for both innovative and positive government action [...] and misinformation, breached protocols and harmful incidents [...]. What the Snowden affair reminds us that there is much ongoing – underwritten by public resources and potentially affecting the public – that requires analysis and oversight and political dialogue [...]. Whether such oversight and dialogue exist are central to democratic accountability in a digital environment and the ability to navigate escalating tensions between openness and secrecy.⁷³¹

Although the critique is formulated rather broadly, it is, from this perspective, questionable whether the Panel in Germany or the Committee in Canada fulfil the requirements of "analysis and oversight and political dialogue". A positive feature of *Bill C-22* is the fact that it provides for a right of the executive director to conclude contracts or the like with, for example, technical experts to support the Committee or a member of the Committee. The fact that

⁷²⁸ *Ibid* (Meister).

⁷²⁹ S 18 of *Bill C-22* (final version).

⁷³⁰ Roy, *supra* note 527.

⁷³¹ *Ibid* at 100.

the German expert who was consulted to deal with the selectors lists was unable to comprehend the technological background of the illegalities, can be seen as an example of how ineffective oversight may be when it comes to digital agendas. There are also claims that even the G10 Commission members in Germany are not effectively trained.

In Canada, the possibility to consult technical experts may be seen as an advantage of *Bill C-22*. However, the mandate of the new Committee is so broad and the fact that there is no body comparable to the G10 Commission raises doubts as to whether the Committee will be able to deal with the projected amount of information and will still have time to cope with the new developments in the digital age. Since the intelligence and secret services are staffed with IT-experts, it might be necessary to consider having experts in the permanent staff who are able to deal with the digital e-governance that is becoming increasingly important. In addition, corporate firms such as Google, Facebook, etc., but also smaller (international) companies might not only have great influence on issues such as privacy and also on laws governing national security issues. Possible collaborations of intelligence agencies with firms that gather millions of (meta) data may also become an issue for the control bodies. And even if the agencies do not themselves collect the information necessary to get a comprehensive image of an individual, they might very well get access (in one way or another) to the databases of those companies.

Therefore, the scope of the data the services and departments are getting access to is growing increasingly fast. The parliamentary control bodies do need the knowledge and the time to deal with those developments that will continue and even accelerate in the future in times of microtechnology and artificial intelligence. So far, the only step that the Canadian Committee can take is the possible consultation with experts. Thus, one might conclude that neither *Bill C-22* nor the *PKGr Act* or *G10 Commission Act* explicitly provide answers to the new problems of the digital age. I will come back to those problems my conclusion.

V. Review and Oversight

The difference between oversight and review has already been described in both chapter 1 and chapter 2. Since this topic has also been brought up by almost every scholar and in every report that has (been) written on (parliamentary) control of the secret services, this thesis will only broadly address a few points. In general, a few arguments that were brought up against oversight mechanisms (this time with regards to the RCMP) were mentioned in the Arar Inquiry. Apart from the possible threat to the independence of the police (the only point very specific to the RCMP), O'Connor mentioned "a risk that an oversight mechanism could confuse or even diminish the accountability of the RCMP to government and, correspondingly, the responsibility of government for the RCMP. Finally, there is a danger that an oversight body's review function would be compromised by its active involvement in the activity being reviewed. This

could occur where the oversight body approved or, alternatively, failed to veto or prevent an activity by the agency subject to oversight.”⁷³²

In 2014, Dietrich, mentioned the following prerequisite for an effective control of both the secret services’ activities and their efficiency: the control “has to accompany the perception of the task of the intelligence services permanently—in the sense of a real, concurrent control—, and it has to free itself from an event control.”⁷³³ In Canada, *Bill C-22* will establish a review Committee. It does, however, not prohibit to oversee certain activities and, indeed, includes them by necessarily implication: in s 8 (2), the limitations to the mandate of the Committee, it is stated that in order to be excluded from the mandate, the activity has to be ongoing *and* considered to be injurious to national security by the Minister. Therefore, it seems to be possible for the Committee to oversee certain activities if they are not considered to be injurious. It is unclear though whether the Committee would actually receive the necessary information and be able to report on it; firstly because of the rather broad limitations to the access to information and to the public report, and secondly, because of the missing rights to self-information (see above). From the perspective of Dietrich, the possible oversight role of the Committee might, therefore, not be sufficient as the Committee does not provide for a permanent “concurrent control”. However, that kind of control would possibly interfere with the principle of the separation of powers to an extent that might not be considered constitutionally legitimate.

Oversight and review do, however, not need to be mutually exclusive. In terms of efficiency and to prevent accountability gaps, it would not be a question anymore if the control panel/review committee was allowed to also oversee certain activities of the agencies, but the question is rather how much information it would receive in certain instances. As for the core area of executive autonomy, Nees postulated: “Although the core area [...] also covers information relating to the decision-making process of completed operations, the interest in protection is not to be overestimated, given the effectiveness of parliamentary scrutiny, since the danger of influencing government decisions by third parties is much higher in ongoing matters.”⁷³⁴ One may therefore argue that the interest is just to be weighted the other way around for ongoing activities. Nees continues to argue, seizing on judgements of the Constitutional Court (with regard to review), that “the interest in information must be given a particularly high weight when ‘it comes to detecting possible legal violations and similar grievances within the government’”.⁷³⁵ This interest is, however, particularly high *while* the activities are going on. Should statutory violations and (severe) illegalities only be

⁷³² Arar Commission, *supra* note 588 at 500.

⁷³³ “[...] dauerhaft – im Sinne einer echten mitlaufenden Kontrolle – die Wahrnehmung des nachrichtendienstlichen Auftrags begleiten und sich von der Anlasskontrolle lösen.” (Translation mine). Dietrich, *supra* note 368 at 208.

⁷³⁴ “Informationen, die sich auf die Entscheidungsvorbereitung abgeschlossener Vorgänge beziehen, sind zwar auch vom Kernbereich [...] umfasst, das Schutzinteresse ist vor dem Hintergrund effektiver parlamentarischer Kontrolle aber nicht mehr so hoch anzusetzen, denn die Gefahr der Beeinflussung von Regierungsentscheidungen durch Dritte ist bei laufenden Angelegenheiten deutlich höher.” (Translation mine). Nees, *supra* note 22 at 677.

⁷³⁵ “[...] dem Informationsinteresse besonders hohes Gewicht beizumessen ist, wenn ‘es um die Aufdeckung möglicher Rechtsverstöße und vergleichbarer Missstände innerhalb der Regierung geht’.” (*Ibid* at 677, citing *Untersuchungsausschuss Gebeimgefangnisse*, *supra* note 126 at 123 and *Rüstungsexport*, *supra* note 178 at 231f.

discovered *ex post* instead of preventing them before or ending them while they are occurring (with regards to highly problematic illegalities, for example, the encroachment upon the fundamental rights of many innocent citizens)? The autonomy of the government is considered necessary in order to protect the separation of powers and to leave the government to decide upon the necessary actions to be taken. Therefore, it makes sense in general to not disclose information on whether the government was at variance when making that decision or on which governmental authority had which opinion. It is also surely reasonable for the government to not simultaneously report to the Panel or Committee while it is still deliberating, so that the Panel or Committee may not exercise too much influence on the decision. However, the question arises if the effectiveness of parliamentary control should not be established and/or preserved as well. Likewise, when overseeing the departments and agencies, it is still up to the Executive to disclose information, possibly even a lot less information than in closed cases. Therefore, there is still a safeguard in place, as there is the dependency on the Executive's assessment and in some form a discretion to disclose information.

In addition, one needs to remember that judicial review of encroachments upon fundamental rights by the departments or agencies is always something that happens when the interventions have already occurred. Parliamentary control of the agencies does mostly not even aim at protecting individuals (apart from the G10 Commission in Germany in some way) but is nonetheless the only way of preventing those encroachments—possibly not in each individual case but at least for extensive mass interventions that have taken place in the past. To give the parliament only review power might forego that possibility and leave the protection of fundamental rights in these cases to an *ex post* settlement—a kind of protection that is surely not the one that was aimed at when the Basic Law or the Charter of Rights and Freedoms were adopted.

In Germany, the fact that the government is the institution in charge of all decisions—even if the Panel knows about certain activities before or during their enforcement—is declared in the *PKGr Act* (§ 4 II): “The political responsibility of the Federal Government for the authorities referred to in § 1 shall remain unaffected.”⁷³⁶ A similar provision is missing in the Canadian *Bill C-22*, to make sure that the core area of the principle of the separation of powers is not breached. In this regard, it only has the legal role to control the Executive, not that to make decisions. These thoughts on review and oversight powers will be considered again in my conclusion.

VI. Minority Rights

To distinguish parliamentary from judicial control, Gusy states: “Parliament is vigilant about the concerns of the political majority, the courts the perception of the minorities concerned.”⁷³⁷ Within Parliament, however, parliamentary

⁷³⁶ “Die politische Verantwortung der Bundesregierung für die in § 1 genannten Behörden bleibt unberührt.” (Translation mine).

⁷³⁷ “Das Parlament überwacht die Belange der politischen Mehrheit; die Gerichte die Wahrnehmung der betroffenen Minderheiten.” (Translation mine). Gusy, “Grundrechte”, *supra* note 30 at IX.

control is indeed rather some kind of “minority control” since the MPs of the governmental parties are often reluctant to efficiently exercise it. Therefore, the decisive relationship is the one between the parliamentary groups that form the government and those of the opposition rather than that between the parliament in general and the government.⁷³⁸ Consequently, the rights for the minority groups and the individual MPs might be one of the main factors to determine the efficiency of parliamentary control bodies.

In Germany, the first obstacle for the minority to get members elected to the Panel is the fact that every single member of the Panel has to be elected by an absolute majority of the MPs (the so-called Chancellor majority [*Kanzlermehrheit*]). At the same time, there is no right of any parliamentary opposition group to have members in the Panel. Instead, even the Constitutional Court held that “status rights of the MPs” could be limited, if necessary, because of “compelling reasons relating to the welfare of the State [confidentiality]”.⁷³⁹ However, election to the Panel has to be based upon expertise instead of trying to obstruct the minority, in particular, since “the participation of all political groups in parliamentary bodies is fundamentally a constitutionally required procedure.”⁷⁴⁰ A minority right of particular importance is the “right to convocation and information”.⁷⁴¹ Thus, a single parliamentarian in the Panel can request a meeting of the Panel and information, both of which cannot be denied. Another major right of the opposition was abolished in the course of the latest reform; for the first time, the *PKGr Act* specifically mandates that the Chair and Vice-Chair of the Panel are elected among its members. Beforehand, there was no rule on this in the Act itself. This new provision led to a further change in the *rules of procedure of the PKGr*, which beforehand mandated a rotating Chair/Vice-Chair position for the opposition and the majority. Now, it only states that either Vice-Chair or Chair needs to come from the opposition—and it is to be expected that the Chair will always come from the majority groups. With that, a regulation and minority right got abolished that was internationally praised, inter alia in the legislative process of *Bill C-22*.⁷⁴² The rights according to § 5 of the *PKGr Act* are in general not minority rights. § 14 of the *PKGr Act* that makes it possible to go to the Constitutional Court is not defined as a minority right (“The Federal Constitutional Court shall rule on disputes between the Parliamentary Control Panel and the Federal Government at the request of the Federal Government or at least two-thirds of the members of the Parliamentary Control Panel.”⁷⁴³). Additionally, the minority cannot sanction the government (a majority vote is needed) (see below).

⁷³⁸ *Ibid.*

⁷³⁹ “Statusrechte der Abgeordneten; zwingende Gründe des Staatswohls.” (Translation mine). *Stabilisierungsmechanismusgesetz*, *supra* note **Fehler! Textmarke nicht definiert.** at 359.

⁷⁴⁰ “Die Beteiligung aller Fraktionen in parlamentarischen Gremien grundsätzlich ein verfassungsrechtlich gebotenes Verfahren darstellt.” (Translation mine). Singer, *supra* note 38 at 65.

⁷⁴¹ “Recht auf Einberufung und Unterrichtung.” (Translation mine). *Ibid.*

⁷⁴² Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 82 (27 September 2016) at 5138 (MP Murray Rankin).

⁷⁴³ “Das Bundesverfassungsgericht entscheidet über Streitigkeiten zwischen dem Parlamentarischen Kontrollgremium und der Bundesregierung auf Antrag der Bundesregierung oder von mindestens zwei Dritteln der Mitglieder des Parlamentarischen Kontrollgremiums.” (Translation mine). § 14 *PKGr Act*.

Bill C-22 provides for members of the opposition to be granted seats in the Committee. It does not, however, say that each parliamentary group needs to be represented. Whereas the Governor in Council designates the Chair (upon the Prime Minister's recommendation), it cannot be expected that the position will ever be held by a member of the opposition. Additional explicit minority rights are not provided for in the Bill. Since the Committee will consist of Senators as well as members of the House of Commons (of a maximum of eight parliamentarians, only five may come from the majority group), the minority will in most cases be dependent on the Senators. If one accepts the perspective that parliamentary control needs a strong minority, this would be one of the major problems of the new Committee in terms of efficiency. Since there are—as mentioned above—not many possibilities to get information apart from the formal request, the new Committee might be quite dependent on the government. This is not always considered as problematic. Indeed, to call parliamentary control a minority right also has its opponents. In the German context, Hirsch criticised the growing number of parliamentarians of different parliamentary groups in the Panel already in the 1990s. With regards to Bündnis90/Die Grünen's first involvement in the PKK, he noted: "The services are very sceptical about representatives who are not members of the traditional parties."⁷⁴⁴ He also concluded that there was a growing reluctance of the agencies to disclose information, and additionally argued: "Security experts from the traditional parties are more likely to be able to inquire more deeply at certain points because of their greater experience."⁷⁴⁵ Hirsch does not explain why he came to this conclusion. Neither in the 1990s nor now must a parliamentarian have a certain background in security matters to become a member of the Panel (although specific expertise would be desirable). From Hirsch's perspective, *Bill C-22* does provide for some rules that may increase the agencies' and departments' trust in the Committee: the rule, for example, that only parliamentary groups of the House of Commons that have at least 12 seats may send members to the Committee, and the fact that there are no explicit minority rights or rights to self-information (of the minority). Furthermore, it is argued that "[f]ew members of parliament have expertise in national security or intelligence matters at the time they are elected. Those in the executive branch, by contrast, have mostly been selected for their position precisely because of their expertise in some aspect of national security affairs".⁷⁴⁶

Bill C-22 does also not call for specific requirements the parliamentarians must fulfil in order to be appointed to the Committee. This applies to both majority as well as minority groups although it can be expected that the Prime Minister (in some cases after consultation with the leader of a minority party) will appoint members to the Committee that have some kind of experience in matters of national security or similar matters. It is, furthermore, doubtful that

⁷⁴⁴ "Die Dienste stehen den Vertretern, die nicht den traditionellen Parteien angehören, sehr skeptisch gegenüber." (Translation mine). Hirsch, *supra* note 102 at 293.

⁷⁴⁵ "Sicherheitsexperten aus den traditionellen Parteien sind aufgrund ihrer größeren Erfahrung eher in der Lage, an bestimmten Punkten vertieft nachzufragen." (Translation mine). Hirsch, *supra* note 102 at 293, Footnote 50.

⁷⁴⁶ Fred Schreier, "The Need for Efficient and Legitimate Intelligence" in Hans Born & Marina Caparini, eds, *Democratic Control of intelligence services: containing rogue elephants* (Aldershot: Ashgate, 2007) at 40.

the parliamentarians in the Committee from the majority group would ask more specific questions in certain instances; indeed, they might—differing from the Senators and parliamentarians of the opposition—also be under pressure from their parliamentary groups during the Committee’s work.

In conclusion, without specific provisions that create minority rights or without rather low quora for the exercise of certain rights, and, additionally, without the possibility to give dissenting opinions on matters in the annual report (and—in the case of Canada—in special reports), it might be difficult to trust the Committee that its true objective is the control of activities in matters of national security, not the support of the government (see below). As for the importance of the possibility of the minority to go to Court as well as the difficulties of minorities to prevail, a recent judgement of the German Federal Court of Justice will conclude this paragraph. The reader’s assessment of the judgement will probably depend on his opinion on the above-mentioned contrasting views.

In 2016, the NSA-Committee of Inquiry in Germany (the judgement does not talk about the PKGr or its rights) discussed asking Edward Snowden to come to Berlin to be a witness in the Inquiry. The two members of the opposition (one of Bündnis90/Die Grünen and one of Die Linke) submitted the request to ask the government to make it possible to invite and question Snowden. The parliamentarians of the majority rejected the motion. In November 2016, the “investigating judge at the Federal Court of Justice who had been seised” decided that the government would indeed have to make it possible to question Snowden.⁷⁴⁷ The judgement was seen as one of the major rulings, emphasising the opposition powers of Parliament.⁷⁴⁸ In 2017, however, after a complaint/appeal of the Committee of Inquiry, the Court decided that the two members did not fulfil the necessary quorum. Contrary to the wording of § 17 *PUAG* (one fourth of the members of the Committee of Inquiry), the minority would need to represent at least one fourth of the members of parliament (applying the wording of Art. 44 of the *Basic Law*: The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry [...])⁷⁴⁹ in order to have the right to take evidence and to ask an investigating judge to decide on it if the majority rejects the motion.⁷⁵⁰

⁷⁴⁷ Bundesgerichtshof (Federal Court of Germany), 1 BGs 125/16 (1 ARs 1/16) – Beschluss vom 11. November 2016.

⁷⁴⁸ Markus Reuter, “Bundesgerichtshof: NSA-Untersuchungsausschuss muss Snowden persönlich einladen”, *netzpolitik.org* (21 November 2016), online: <<https://netzpolitik.org/2016/bundesgerichtshof-nsa-untersuchungsausschuss-muss-snowden-persoendlich-einladen/>>.

⁷⁴⁹ Art. 44 I of the Basic Law: “The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry, which shall take the requisite at public hearings. [...]”

⁷⁵⁰ Bundesgerichtshof (Federal Court of Germany), 3 ARs 20/16 – Beschluss vom 23. Februar 2017.

VII. “Partisan Motivations”?

One of the major worries of people who are sceptical of parliamentary control (bodies) is that they are afraid of parliamentarians misusing the body for partisan reasons, particularly since “parliamentary control is political control”⁷⁵¹. This fear was also brought forward on several occasions on the long path to the new parliamentary control committee in Canada (also mentioned in chapter 2), for example, in the aftermath of the MacDonald Commission in the Senate⁷⁵². However, considering this argument, one may also wonder about the intentions and motives of the members of government, who are, indeed, parliamentarians themselves. Therefore, the fear of parliamentarians who use intelligence information for partisan reasons and who are misusing their influence for their own benefits may very much also be true for the parliamentarians who form the government. Therefore, there is no reason to exclude parliamentarians from intelligence oversight/review as there would then neither be any parliamentary nor executive control. One may also argue that the executive is even more in danger of considering intelligence work as something for its own benefit, as a support for its own policy; otherwise, it would ignore its results. Thus, “to be effective [...], intelligence must be aware of and respond to the policy-maker’s priorities and concerns.”⁷⁵³ According to Caparini, “the danger of providing intelligence that confirms policy-makers’ preferred options is that it may lead to ignoring danger signals that the policy is misguided, out of touch with developments, or will not have the intended effect.”⁷⁵⁴ Therefore, she concludes, “good governance of the intelligence sector in a democratic state relies on a combination of factors: the need for effective executive direction of the intelligence and security services under its control, but simultaneously a self-conscious exercise of restraint by the executive to avoid over politicisation of the intelligence product and to allow sufficient independence to see beyond obvious existing threats and the immediate political concerns of the current government.”⁷⁵⁵ In this case, one may, however, ask the question whether the parliamentarians of the executive are indeed more trustworthy than the parliamentarians in the oversight/review bodies. Both may or may not try to misuse the intelligence sector for their own partisan reasons or to gain a political advantage from its work. Indeed, one may argue that this problem does exist but should not be used against the idea of a parliamentary control body and in favour of executive control, as it is done so often. And indeed, even Smidt, a long-time employee of the BND in Germany, described in 2007: “[T]he intelligence official is not only interested in a strong executive but also in a strong parliamentary control. For him parliamentary control is even more important than

⁷⁵¹ Peitsch & Polzin, *supra* note 132 at 388.

⁷⁵² Forcese & Roach, *supra* note 522 at 405.

⁷⁵³ Marina Caparini, “Controlling and Overseeing Intelligence Services in Democratic States” in Hans Born & Marina Caparini, eds, *Democratic Control of intelligence services: containing rogue elephants* (Aldershot: Ashgate, 2007) at 7, citing Glenn P. Hastedt, “Controlling Intelligence: Defining the Problem” in Glenn P. Hastedt, ed, *Controlling Intelligence* (London: Frank Cass, 1991) at 10.

⁷⁵⁴ *Ibid* (Caparini) at 7.

⁷⁵⁵ *Ibid* at 8.

executive control, which is characterised by the viewpoint of the majority of the government and represents corresponding interests.”⁷⁵⁶ Instead, through including opposition parties, parliamentary control is the only form of control that is to “represent the majority of the people. [...] [The intelligence service] needs parliament [for building trust/confidence within the population].”⁷⁵⁷ Smidt, therefore, aims at an increasing legitimising effect of parliamentary control.

Instead of worrying about partisan motivations, one might worry about the “danger [...] that such an oversight body gets too close to the agencies it is responsible for overseeing”.⁷⁵⁸ Therefore, one needs to assess the current bodies in Canada and in Germany: Do they provide for the necessary safeguards to not only prevent the parliamentarians to misuse the bodies for partisan reasons but also to manage the risk of a control body too closely associated with the agencies? And what can be learned from the German history of parliamentary control?

When having a look at chapter 1 and the long story of parliamentary control in Germany, one may indeed not see it as a simple success story. In particular, the continuous lack of information and the persistent opposition of the governments have caused the problem of control bodies that have often only received information on scandals through the media. However, none of the scandals in the realm of national security in Germany has been due to (at least not to the knowledge of the public) partisan motivations of members of the control bodies. Nonetheless, when looking at the different bills that were proposed during the last years in Germany (see above), the following tendencies are noticeable: the willingness of the minority parliamentary groups to drastically enhance and increase the rights of the Panel (obviously also with regard to minority rights), and that the bills and reforms that were proposed by the respective governments in the past and in 2016 have often led to controversies if they actually aimed at all at increasing the Panel’s powers. This is not only due to the wishes of the parliamentarians of the majority parties; the members of the minority groups who—as mentioned above—in the past or even today called or call for the abolition of secret services in general, now very much aim at creating a strong and effective parliamentary control body.⁷⁵⁹

In Canada, the parliamentarians who will be appointed to the Committee are not elected but appointed by the Governor in Council on the recommendation of the Prime Minister. Therefore, the danger of partisan motivations exists

⁷⁵⁶ “[D]er Nachrichtendienstler ist nicht nur an einer starken exekutiven, sondern ganz besonders auch an einer starken parlamentarischen Kontrolle interessiert. Die parlamentarische Kontrolle hat für ihn sogar einen noch höheren Stellenwert als die exekutive Kontrolle, die ja vom Blickwinkel der Regierungsmehrheit geprägt ist und entsprechende Interessen vertritt.” (Translation mine). Wolbert Smidt, “Kritik des mehrpoligen Parlamentarischen Kontrollsystems in Deutschland” in Norbert Röttgen & Heinrich Amadeus Wolff, eds, *Parlamentarische Kontrolle – Die Nachrichtendienste im demokratischen Rechtsstaat* (Sankt Augustin/ Berlin: Konrad-Adenauer-Stiftung, 2008) at 46.

⁷⁵⁷ “[...] repräsentieren den größten Teil der Bevölkerung. [...] [Der Nachrichtendienst] braucht [für die Vertrauensbildung in der Bevölkerung] das Parlament.” (Translation mine). *Ibid* at 46.

⁷⁵⁸ Born & Leigh, *supra* note 675 at 11.

⁷⁵⁹ For example: “Ich möchte, dass künftig ein Tonband mitläuft” (Interview with Hans-Christian Ströbele), *Spiegel Online* (16 January 2014), online: <www.spiegel.de/politik/deutschland/stroebele-fordert-grosse-reform-des-parlamentarischen-kontrollgremiums-a-943744.html>.

there as much as in Germany including because the PM directly appoints the Chair. And indeed, the fear of parliamentarians leaking information and not respecting the secrecy of information, i.e. the lacking of trust in the MPs in security matters, has played a major role in the long delay of the establishment of a parliamentary committee in Canada. In Germany, the parliamentarians, as “members of the constitutional bodies of the Federal State”⁷⁶⁰ are not subject to the Security Screening Act (*Sicherheitsüberprüfungsgesetz*)⁷⁶¹, a fact that has not yet been considered problematic, whereas *Bill C-22* requires such screening. Why would Canada trust its parliamentarians to a lesser extent?

VIII. Whistle-blowers

In order to talk about whistle-blowers, one has to distinguish between (at least) two different kinds of people who expose information. Firstly, one may talk about whistle-blowers when describing former officials or employees of officials in the field of national security such as Edward Snowden who leak information to the media or other institutions. One may, secondly, also talk about whistle-blowers when describing the right of the parliamentarians (of a control body) to contact, for example, the Attorney General, the whole Parliament or the leaders of the parliamentary groups if they are confronted with information that hints at illegal activities of the secret services or departments.

Concerning the latter, arguments in favour of this kind of whistle-blowing run as follows: having a system for the parliamentarians to make the public, the Attorney General or other parliamentarians aware of a situation that, for example, involves illegal behaviour of secret services has the great benefit of making leaks to the media unnecessary. Indeed, as for the “leaking of classified information by members of [inter alia] the legislature [...]”, many believe that leaks are a necessary corrective when there is too much secrecy and the public interest is not being served by a high degree of secrecy.”⁷⁶² A provision as such may, however, not completely diminish the danger of possible leaks as “[...] it must be acknowledged that leaks occur for other reason as well, such as efforts to embarrass political and bureaucratic rivals.”⁷⁶³ Indeed, whereas official provisions may make certain “leaks” because of illegal behaviour of the executive less necessary, leaks because of ‘wrong’ reasons might very well not be prevented by them. However, as mentioned above, there are no examples of leaks by parliamentarians of the German PKGr that the public knows of. The fact that parliamentarians might feel the need to leak information to the press might furthermore be prevented through sufficient power to report on wrong-doings in special and annual reports and the right to give a dissenting opinion. In Canada, as MP Rankin mentioned during the debates on *Bill C-22*, there is even “a precedent

⁷⁶⁰ § 2 III Nr. 1 *Gesetz über die Voraussetzungen und das Verfahren von Sicherheitsüberprüfungen des Bundes*, Federal Law Gazette I, 1994 at 867, as last amended by Article 5 of the Act of 30 June 2017, Federal Law Gazette I, 2017 at 2130.

⁷⁶¹ *Ibid.*

⁷⁶² Caparini, *supra* note 753 at 20,21.

⁷⁶³ *Ibid.*

for [such whistle-blower clause for the parliamentarians in the Committee to go to the Prime Minister and the Attorney General]. Section 273.63 of the *National Defence Act*⁷⁶⁴ imposes the same whistle-blowing obligations on the commissioner responsible for CSEC.⁷⁶⁵ In its final version, *Bill C-22* also provides for this duty of the Committee as a whole. The obligation is once again not developed as a minority right. From the perspective mentioned above that sees minority rights as one of the most important pre-conditions for guaranteeing an effective control, the provision in *Bill C-22* might, however, not be far-reaching enough; it might still be possible that the parliamentarians of the majority party that forms the government would argue that there was no reason to inform the Attorney General if it was not concerning activities or events that were quite undeniably incompatible with the law.

The former type of whistle-blower is also controversial, especially since the revelations of Snowden have led to a global scandal, especially in the press. At first, a whistle-blower needs to be distinguished from a spy.⁷⁶⁶ Whereas spies leak “state secrets to other states or hostile non-state actors to provide them with a competitive advantage; whistle-blowers reveal state secrets to the public at large according to some (self-defined) concept of serving the public interest and/or following their own conscience.”⁷⁶⁷ Indeed, Edward Snowden stated as his motivation in *The Guardian*:

This is something that’s not our place to decide, the public needs to decide whether these programs and policies are right or wrong. And I’m willing to go on the record to defend the authenticity of them and say, ‘I didn’t change these, I didn’t modify the story. This is the truth; this is what’s happening. You should decide whether we need to be doing this.’

It is problematic that the revelations of a whistle-blower, who is committing a crime in many jurisdictions with these revelations, may have a negative effect on the whistle-blower (criminal punishment) but a positive one on the state in terms of improved legal security architecture and ending illegal activities.⁷⁶⁸ Therefore, many scholars note that the improvement and “strengthen[ing of] official accountability mechanisms [...] that will reduce or obviate the need for more Snowden-like leaks” have often been considered as the answer to the contradiction of the importance but also danger of whistle-blowing.⁷⁶⁹ Caparina argues that “[a]ccountability is especially served when whistleblowers are guaranteed protection from legal or disciplinary action, enabling them to draw attention of oversight bodies to misconduct.”⁷⁷⁰

From this perspective, *Bill C-22* is missing a major component of an accountability mechanism without gaps leading people to become whistle-blowers: the new Committee will not hear whistle-blowers from the departments or agencies. There is no provision that either makes a hearing possible and/or protects the whistle-blowers from legal or

⁷⁶⁴ *National Defence Act*, R.S.C., 1985, c. N-5.

⁷⁶⁵ Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 82 (27 September 2016) at 5141 (MP Murray Rankin).

⁷⁶⁶ Whitaker, “Guerilla”, *supra* note 695 at 205.

⁷⁶⁷ *Ibid* at 205.

⁷⁶⁸ *Ibid* at 206.

⁷⁶⁹ *Ibid* at 207.

⁷⁷⁰ Caparini, *supra* note 753 at 11.

disciplinary action. Therefore, *Bill C-22* does not close this particular accountability gap. The *Public Servants Disclosure Act* is not excluded by *Bill C-22*. According to s 17 of the Act, however, the relevant provisions of the Act “do not apply in respect of any information that is special operational information within the meaning of subsection 8(1) of the Security of Information Act.”⁷⁷¹ Whereas this subsection defines virtually all information as special operational information, the Public Servants Disclosure Act does not apply to the security and intelligence realm. Therefore, the members of the Military Police who filed the most recent complaint to the Military Police Complaints Commission re treatment of Afghan detainees did so anonymously and have not come out as whistle-blowers.⁷⁷²

There are, however, voices that argue that not even a more effective and far-reaching oversight/review body can close the gap that whistle-blowers try to fill. Whitaker argues that “the very need for, and existence of, whistle-blowers is rooted in the inherent limitations and inadequacies of existing mechanisms of accountability.”⁷⁷³ Given the problems of information access, the partisan motivations of members of both the executive and the legislative as well as the knowledge gaps, this thesis has already mentioned several limitations to parliamentary control. Thus, one may argue in line with Whitaker that there are those “inherent limitations” to accountability. Konstantin von Notz, a parliamentarian of Bündnis90/Die Grünen in Germany, who is not a member of the PKGr but of the NSA-Committee of Inquiry, recently argued—with regard to the new information that the BND has seemingly spied on institutions such as Euro-pol and Interpol (according to *Der Spiegel*)—“[t]hat all these things come out through journalistic research and whistle-blowers like Snowden, reveals the lack of solid legal containment of the work of the services and the ineffectiveness of parliamentary control.”⁷⁷⁴ As this cannot be an excuse for not trying to fill the gaps as fully as possible and creating the most effective possible oversight/review body, *Bill C-22* still displays a certain lack of effort to address this important dimension. This becomes particularly obvious when we look at the German problems of illegal activities of the BND and von Notz’ statement because Germany actually provides for some whistle-blower protection (specific to the intelligence/security sector) in § 8 *PKGr Act 2016*:

Members of the intelligence services are allowed to turn directly to the Parliamentary Control Panel, without acting through official channels, in the case of official affairs or internal malpractice, but not in their own or the interests of other members of these authorities. Because of the fact that they passed a concern, they are not allowed to be officially disciplined or to be disadvantaged. The Parliamentary Control Panel submits the concerns to the Federal Government for its opinion. The name of the communicating person is only known to the extent that this is necessary for the clarification of the facts.⁷⁷⁵

⁷⁷¹ *Public Servants Disclosure Act*, S.C. 2005, c. 46.

⁷⁷² Canada, Military Police Complaints Commission, MPCC Determines Scope of Public Interest Investigation Into Anonymous Complaint (Treatment of Detainees) (Ottawa, March 2017), online: <http://www.mpcc-cppm.gc.ca/03/305/anonym-2015-005-over-2017-03-02-eng.aspx>.

⁷⁷³ Whitaker, “Guerilla”, *supra* note 695 at 207.

⁷⁷⁴ “[D]ass all diese Dinge durch journalistische Recherche und Whistleblower wie Snowden rauskommen, offenbart das Fehlen belastbarer rechtlicher Einhegung der Arbeit der Dienste und die Wirkungslosigkeit parlamentarischer Kontrolle.” (Translation mine). Simon Rebiger, “BND überwachte jahrelang internationale Polizei-Behörden”, *netzpolitik.org* (24 April 2017) at <https://netzpolitik.org/2017/bnd-ueberwachte-jahrelang-internationale-polizei-behoerden/>.

⁷⁷⁵ “Angehörigen der Nachrichtendienste ist es gestattet, sich in dienstlichen Angelegenheiten sowie bei innerdienstlichen Missständen, jedoch nicht im eigenen oder Interesse anderer Angehöriger dieser Behörden, ohne Einhaltung des Dienstweges unmittelbar an das

Despite the whistle-blowers' supposed better protection than the non-existent one in Canada's new bill, the prospect that their names might still get disclosed cannot be seen as a sign of the effective official accountability that was called for by Whitaker and other scholars. And indeed, so far there have not been many "submissions" in accordance with § 8. In the report of the PKGr for the time from November 2013 to November 2015, only one employee of the agencies had complained to the Panel "about the head of a service. However, the allegations could not be confirmed."⁷⁷⁶ It was furthermore proposed several times that whistle-blowers would also need to have the right to not talk to the whole Panel but to certain specific parliamentarians whom they would trust. This, however, might lead to a certain kind of graduated knowledge within the Panel and strengthen partisan motivations and group interests.

Concluding and in line with the advocates of accountability through whistle-blower provisions, one may therefore argue that if the agencies and departments knew of an effective accountability mechanism that would also protect the whistle-blowers, it might lead to a government and to agencies that would be more willing to disclose issues on their own initiative, in order to prevent their employees from talking to (certain) parliamentarians. Thus, an additional pressure would help to increase the executive's willingness to cooperate with the legislative. This will not be the case in either Germany or Canada with their "current" or soon-to-be models of parliamentary control.

IX. More for More

The question whether there is also a balance between the agencies' powers and rights and those of the parliament's control body may furthermore be interesting. Should there be a logic like: the more rights a national security agency has, the more rights the review body should get? In Roach's opinion, a defective balancing might be the origin of "accountability gaps" as "governments move to more intense and more integrated 'whole-of-government' national security activities, but without always ensuring that reviews and overseers have corresponding enhanced whole-of-government powers and adequate resources to keep pace with what is being reviewed."⁷⁷⁷

Indeed, in the years following 9/11, in both countries, Germany and Canada, the legal rights and powers of the secret services have been increased drastically (*Bill C-51* and the *Gesetz zur Ausland-Ausland-Fermeldeaufklärung des BND* are just two examples). In addition, in Germany, many of the illegalities that the BND conducted in the past are now being legitimised in the law. Should the result of illegalities thus indeed be their legitimisation instead of their legal sanctioning?

Parlamentarische Kontrollgremium zu wenden. Wegen der Tatsache der Eingabe dürfen sie nicht dienstlich gemäßregelt oder benachteiligt werden. Das Parlamentarische Kontrollgremium übermittelt die Eingaben der Bundesregierung zur Stellungnahme. Es gibt den Namen der mitteilenden Person nur bekannt, soweit dies für eine Aufklärung des Sachverhalts erforderlich ist." (Translation mine).

⁷⁷⁶ "[...] über die Leitung eines Dienstes. Die Vorwürfe konnten jedoch nicht bestätigt werden." (Translation mine). Germany, Deutscher Bundestag, *Unterrichtung durch das Parlamentarische Kontrollgremium*, 18th Parl, BT- Drucksache 18/7962 (21 March 2016) at 13.

⁷⁷⁷ Kent Roach, "Permanent Accountability Gaps and Partial Remedies" in Michael A. Geist, ed, *Law, privacy, and surveillance in Canada in the post-Snowden era* (Ottawa: University of Ottawa Press, 2015) at 168, 169.

In Canada, one may see the establishment of the new Parliamentary Committee as the ‘more’ in respect to accountability and review, especially as it was promised during the election process as an answer to *Bill C-51*. However, the Committee was no new idea, as was outlined in chapter 2. It does not have any far-reaching rights and powers that were not thought of in the years before *Bill C-51*. In fact, as outlined in chapter 2, older ideas on parliamentary control in Canada were more ‘progressive’ in terms of giving the parliamentarians access to information or powers to sanction the government. It is therefore doubtful that the new Committee is an adequate response in the sense of ‘more for more’ when looking at the broad and wide powers for the agencies conferred upon them by *Bill C-51*.

Indeed, one may ask why the ‘more for more’ approach is not the typical answer to the need to increase the agencies’ powers—the latter’s powers are increased, either because of an objective necessity or because of a subjective need of the public to feel secure, but so could the control bodies’ powers be increased. If it was a ‘one stop shop’ to increase both the powers of the agencies and the powers of the review bodies (not oversight bodies that have the power to veto activities of the agencies), would this really limit the new powers of the agencies? The question is why the general perception of a review body is that it is limiting the agencies’ *legal* powers and *legal* behaviour whereas, instead, its mandate is to review its activities in terms of, for example, effectiveness, efficiency, propriety or legality—thus to help, support and possibly improve the agencies’ activities and behaviour.

With respect to Germany, Dietrich argues: “There is a need for change in mentality among controlled and controllers. On the side of the services, parliamentary scrutiny will be better accepted if it proves to be a professional, unspectacular and productive factual criticism. On the part of the PKGr, there should be more understanding of the services’ concerns, as long as the Panel sees itself as comprehensively informed.”⁷⁷⁸ Thus, a ‘more for more’-approach could also help to improve the relationship and the cooperation between the controllers and the controlled. So far, this approach has not been applied in Canada or Germany.

X. The Power of Sanctions

The above-mentioned metaphor of “blind guardians” has a second part. When describing the inefficiency of parliamentary control in Germany, the metaphor reads like this: “The parliamentary supervisory authorities are not only blind guardians; they are also guardians without a sword.”⁷⁷⁹ But what kind of ‘sword’ should the control bodies in Germany and in Canada have? Can the history of Germany’s control panel teach any lessons regarding the necessity of sanctions?

⁷⁷⁸ “Es bedarf eines Mentalitätswandels bei Kontrollierten und Kontrolleuren. Auf Seiten der Nachrichtendienste wird parlamentarische Kontrolle besser akzeptiert werden, wenn sie sich als fachlich fundierte, unspektakuläre und produktive Sachkritik erwiese. Auf Seiten des PKGr dürfe mehr Verständnis für die Belange der Dienste vorhanden sein, soweit sich das Gremium umfassend informiert sieht.” (Translation mine). Dietrich, *supra* note 368 at 208.

⁷⁷⁹ “Die parlamentarischen Kontrollinstanzen sind nicht nur blinde Wächter; sie sind auch Wächter ohne Schwert.” (Translation mine). Gusy, “Grundrechte”, *supra* note 30 at 132.

There are currently only a few possibilities in Germany to—broadly speaking—sanction the government if it is not willing to collaborate or if it acts contrary to its obligations, e.g., contrary to the obligation to speak truthfully in hearings or to sufficiently inform the Panel. The annual reports as well as special reports (especially those including dissenting opinions) may be considered as a method of sanctioning the government. The fact that the reports also inform the Bundestag about the cooperation of the government may be of importance,⁷⁸⁰ especially, as the media might get informed about it as well (negative press). Another possibility for the Panel to sanction the government is provided by § 14 of the *PKGr Act*, making it possible to go to the Constitutional Court against the government (and vice versa). A two-third majority of the Panel must submit the motion. As mentioned above, there are, however, no possibilities to bring criminal charges against people who are not telling the truth at the hearings. And there are no other alternative remedies for the Panel.

Therefore, one may conclude that the Panel's power to sanction the government if it is not cooperating according to the law and is unwilling to provide the control body with (the correct) information is relatively limited. The government does not have to fear the Panel—the fear of the media, if they get notice of governmental misbehaviour, is possibly greater). It is no wonder then that the Panel has so far often only heard about scandals through the media⁷⁸¹ (see above). The government has also refused to hand over information on several occasions, a proof of its little respect for the possible impending sanctions if it was illegitimately holding back information. In 2009, Bündnis90/Die Grünen thus called for the right to “sanction violations of the (in special cases) obligation to notify”⁷⁸² by allowing “any member of the Panel to publicly announce, upon prior notice, unless the Panel objects with a two-thirds majority of those present.”⁷⁸³ Further ideas were: “Such a misconduct should be dealt with as a formal official offense with disciplinary action, as well as the consequence that for the respective government official the Federal Minister reports to the PKGr for a limited time. The misconduct must be taken into account in the event of financial and personnel allocations for the intelligence services.”⁷⁸⁴ These ideas were, however, not implemented in the last reform of the PKGr.

⁷⁸⁰ § 13 sentence 2: “Dabei nimmt es auch dazu Stellung, ob die Bundesregierung gegenüber dem Gremium ihren Pflichten, insbesondere ihrer Unterrichtungspflicht zu Vorgängen von besonderer Bedeutung, nachgekommen ist.”

⁷⁸¹ For example, Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. FDP*, 16th Parl, BT-Drucksache 16/1163 (5 April 2006) at 4; Germany, Deutscher Bundestag, *Antrag, Für eine wirksamere Kontrolle der Nachrichtendienste*, 18th Parl, BT-Drucksache 18/8163 (18 April 2016) at 1.

⁷⁸² “[...] Verletzungen dieser [bei besonderen Vorgängen] Unterrichtungspflicht zu sanktionieren.” (Translation mine). Germany, Deutscher Bundestag, *Gesetzesentwurf i.a. Bündnis 90/Die Grünen*, 16th Parl, BT-Drucksache 16/12189 (04 March 2009) at 1.

⁷⁸³ “[...] jede[n] Mitglieds unter Nennung des Vorgangs nach vorheriger Ankündigung im Gremium öffentlich Mitteilung machen, sofern das Gremium nicht mit Zweidrittelmehrheit der Anwesenden widerspricht.” (Translation mine). *Ibid* at 3.

⁷⁸⁴ “Ein solches Fehlverhalten (solle) als förmliches Dienstvergehen mit disziplinarer sowie der Folge behandelt werden, dass für den betreffenden Regierungsvertreter befristet der vorgesetzte Bundesminister dem PKGr berichtet. Bei anstehenden Finanz- und Personalzuweisungen für die Nachrichtendienste ist das Fehlverhalten zu berücksichtigen.” (Translation mine). BT-Drucksache 18/8163, *supra* note 377 at 1.

Gusy describes the difficulty to define the sword, in particular since “we so far lack suitable models”⁷⁸⁵. He does, however, mention a possible improvement of the German system if the parliamentarians of the Panel were allowed to inform the Chair of the respective parliamentary group or other “appropriate members of the group on grievances or control deficits [...] in order to enable the latter to look for remedies. This could be done, for example, by referral to other bodies [...] or by the establishment of Committees of Inquiry”.⁷⁸⁶ The fear of getting exposed can force the agencies to work lawfully and not make use of their powers to an unlimited extent. These ideas are, however, also sceptically received because the group of people with access to secret information would grow bigger. Therefore, the *PKGr Act* does not include any of these rights.

In Canada, the most important power of the Committee has been mentioned in the section on the rights of the committee itself as a whistle-blower: the right of the Committee to “inform the appropriate Minister and the Attorney General of Canada of any activity [...] that, in the Committee’s opinion, may not be in compliance with the law.”⁷⁸⁷ This power is in general also a great power to sanction the executive. However, as already mentioned above, it has two requirements that are probably not easily fulfilled: firstly, the Committee needs to get notice of illegal activities that might be going on; thus, it needs sufficient access to information. Secondly, the members of the Committee have to agree on the analysis of the information they have, i.e., that illegal activities are going on and that they therefore need to report on them.

Another possible power that the Committee may make use of to “sanction” the government or agencies is its power to hold public meetings if no “information is likely to be disclosed” that “a department is taking measures to protect”.⁷⁸⁸ Thus, the Committee may hold meetings in public in which it would not be able to disclose information but could mention and inform the public about the unwillingness of, for example, the government to cooperate. Section 18 of *Bill C-22* does, however, have a second limitation to the right to meet in public. “[I]f the Chair considers [a meeting in private] to be otherwise necessary”, the Committee may not meet in public. Since the Chair (directly appointed by the PM) will likely be a member of the majority and governing party, it is doubtful that he would allow a meeting to be held in public in order to penalise the government or executive.

The right of the Committee to mention in the annual report how often a Minister has withhold information according to s 8 and s 16 can hardly be seen as a power to sanction the government. This is especially so as it must not mention any details or its own assessment of the withholding. Such an evaluation would also be quite difficult since the Committee will not know about the content of the information that it has not seen, and the report might then, additionally,

⁷⁸⁵ “[...] es bislang an geeigneten Vorbildern fehlt.” (Translation mine). Gusy, “Grundrechte”, *supra* note 30 at 135.

⁷⁸⁶ “[...] geeignet erscheinende Fraktionsmitglieder über Missstände oder Kontrolldefizite [...] um diesen zu ermöglichen, ihrerseits nach Abhilfe zu suchen. Dies könnte etwa geschehen durch die Befassung anderer Gremien [...] oder aber durch die Einsetzung von Untersuchungsausschüssen.” (Translation mine). *Ibid* at 135.

⁷⁸⁷ *Bill C-22* (final version), s 31.1.

⁷⁸⁸ *Bill C-22* (final version), s 18.

be revised by the Prime Minister. The list of the withholdings may, however, prevent a Minister from making use of this power without any restraints. The same argument may be true for the Prime Minister who has to give reasons for the revision of the annual report, which is then also being publicised together with the report.

A great limitation is that the Committee must not bring the matter of a Minister's determination to withhold information from it under s 8 and s 16 to Court. Considering the amount of cases in Germany of, in particular, committees of inquiry against the government that had decided to withhold information, cases that were often decided in favour of the committees, the power of the government in Canada to withhold information without being challenged for it is extremely far-reaching.

Gusy, who argued that “we are lacking suitable models”, will likely not change his evaluation once the Canadian Committee will have been formally established. Indeed, Canada could have learned from the experiences of other countries that a control body without any powers of sanctions is hardly assertive; instead, *Bill C-22* does give the government almost unlimited power to withhold information without the Committee being in a position to challenge its decisions.

XI. Information Sharing

In times of terrorism and in the digital age, information sharing is becoming more and more normal. Whereas the thesis has already mentioned international information sharing and its problems, there is also a new dimension when it comes to information sharing of agencies and departments on a national level. Communication platforms such as GTAZ and GETZ in Germany or initiatives such as “Vision 2.0”⁷⁸⁹ in Canada are just a few examples of this new trend that is supposed to enhance security by improving not only the cooperation of the agencies and departments but also their coordination.

In Germany, there is criticism that the parliamentary control is not sufficiently prepared to deal with those—often informal—information exchanges, particularly when agencies or departments from both the federal state and the federal level are included, considering that each federal state has its own parliamentary control body that is not necessarily cooperating with the others or the Federal Parliamentary Control Panel. Whereas the cooperation of the police and the intelligence agencies is increasing, the Panel is not allowed to control the police or its institutions, such as the BKA (mentioned above), due to the principle of separation.

⁷⁸⁹ Canada, Canadian Security Intelligence Service, *Access to Information Act Request by Colin Freeze*, published by *the Globe and Mail* (26 July 2016), online: <https://www.theglobeandmail.com/news/national/article31788061.cce/BINARY/na-security-web-document.pdf>.

Dombert and R  ker concluded that “we need a specific (autonomous) parliamentary control of the cooperation with a focus on the structure of the information platforms to ensure compliance with the requirements, which reviews the efficiency and legality of the inter-agency informal work, the exchange of information and the ways of coordination.”⁷⁹⁰ For Germany, they proposed the establishment a special parliamentary control body that connects the federal with the federal state level.⁷⁹¹ This would, however, mean that whereas the existing agencies and departments increasingly converge, new control bodies must be established—leading to an even more interlocked and complicated control architecture.⁷⁹²

In Canada, the new Committee has a broader mandate than the PKGr. It can review all activities conducted in the realm of national security and is not limited to certain agencies. It may therefore be in a better position to deal with the increasing amount of information sharing. *Bill C-22* was indeed a response to the need for improved information sharing; not only between the agencies as inquiries (recommended by the Air India Inquiry) but also between the control bodies. The Committee should close the accountability gaps that occurred because of the limitations that the other control bodies were facing in their mandate—for example, their restriction to one agency only. Therefore, *Bill C-22* provides a clause that is calling for cooperation between the Committee and the other bodies (also to prevent “duplication of work”, see s 9); additionally, it rules that the Minister, in the case that he is withholding information, also has to inform the respective body responsible for the agency that controlled the information (s 16.3). Furthermore, the Committee may share information under certain conditions with the other review bodies (s 23).

It will be of interest to see whether the Committee can fulfil the duty to close the accountability gaps that have been created—not least because of the lack of information sharing between the control bodies. Canada may potentially become a model for Germany in this respect.

XII. Sharing of Intelligence

Intelligence services are increasingly dependent on sharing their findings with foreign intelligence services and—particularly in the case of smaller countries (by population) like Canada—on relying on foreign intelligence services’ information. One of many concerns in terms of parliamentary oversight and review is the willingness of foreign agencies and governments to collaborate with a country, in which many people (including, for example, parliamentarians of a parliamentary control body) might get access to confidential information. Although most western democracies now have a parliamentary committee for national security in place, their tasks and mandates differ. Thus, foreign

⁷⁹⁰ “[...] es bedarf einer spezifischen [...], auf die Struktur der Informationsplattformen ausgerichteten (eigenst  ndigen) parlamentarischen Kontrolle der Zusammenarbeit zur Sicherstellung der Einhaltung der Vorgaben, die die beh  rden  bergreifende informelle Arbeit, den Informationsaustausch und die Abstimmung auf Effizienz und Rechtm   igkeit hin   berpr  ft.” (Translation mine). Dombert & R  ker, *supra* note 77 at 420.

⁷⁹¹ *Ibid* at 420.

⁷⁹² *Ibid*.

agencies and governments may be less willing to share their information with countries with parliamentary control bodies that have vast powers and “unlimited” (or less limited) access to information. Additionally, whereas trust in one’s “own” parliamentarians might be limited, trust in other countries’ parliamentarians might be particularly low.

This problem is likely to induce the governments of the respective countries to be less willing to increase the powers and rights of the parliamentary control bodies. However, it can also lead to a strict limitation or even reduction of their powers. Broad legal terms and vague concepts can help the executive to limit the access of information for the bodies in order to please and calm foreign executives. Limitations such as “international relations” or the “welfare of the state” in Canada and Germany are gateways to the protection or non-disclosure of information that has been collected by foreign agencies or transferred by one’s own agencies.

The increasing amount of intelligence sharing and cooperation has already led to several scandals and problems that were mentioned throughout this thesis, such as the limitation to information access, the NSA scandal, the above-mentioned examples of renditions as well as the secret CIA prisons on European soil. The “Third Party Rule” that has been used for argumentation both in the case *Charkaoui* in Canada⁷⁹³ as well as in the *NSA selectors list* judgement of the Federal Constitutional Court in Germany is another example of an increasingly difficult task for national review and oversight bodies to fulfil their mandates. In response, several international human rights initiatives have emphasised “that the access of the controllers to information must not fail on the veto of foreign authorities.”⁷⁹⁴

SIRC, as an example, is consulted before CSIS enters into a written agreement on intelligence sharing⁷⁹⁵, and possibly the new Committee will be as well, whereas the German Panel (and the G10 Commission) are informed about intelligence sharing that is taking place. However, these powers still not enable the review bodies to get later access to all information concerning these agreements. The only possible chance to bypass the third-party-rule are therefore rules that bypass it by regulating in such a way that those review committees are not seen as Third Parties. They may then conduct review and oversight without the limitation that is set by foreign governments and agencies.⁷⁹⁶ These kinds of provisions are neither to be found in *Bill C-22* nor in the *PKGr Act*. Presumably, were such provisions to be contemplated in the future, they would need to be worked out in tandem with key intelligence partners or the legislation will not have its intended effect.

⁷⁹³ *Charkaoui (Re)*, 2009 FC 476, [2010] 3 F.C.R. 102 at paras 17 ff.

⁷⁹⁴ “[...] dass der Zugang der Kontrolleure zu Informationen nicht am Veto ausländischer Behörden scheitern darf.” (Translation mine). European Council, Commissioner for Human Rights, *Democratic and effective oversight of national security services*, CommDH/IssuePaper (2015) at 13f., cited in Deutsches Institut für Menschenrechte, *Stellungnahme, Menschenrechtliche Anforderungen an die Ausland-Ausland-Fernmeldeaufklärung und ihre Kontrolle* (26 September 2016) at 15, online: <www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme_Menschenrechtliche_Anforderungen_an_die_Ausland_Ausland_Fernmeldeaufklaerung_und_ihre_Kontrolle.pdf>.

⁷⁹⁵ S 17(2) of the *CSIS Act*.

⁷⁹⁶ Deutsches Institut für Menschenrechte, *supra* note 794 at 15.

Other problems of transnational intelligence sharing vary depending on the circumstances and structure of the agreements: in the EU, information sharing increases; the EU does, however, still provide for supranational safeguards and, for example, the protection of fundamental rights, as the EU-agreement is not one that mainly focusses on aspects of security and intelligence. Therefore, not only the existence of the Charter of Fundamental Rights but also judgements of the European Court of Justice help to protect fundamental rights of—especially—European citizens, also in times of intelligence sharing. Judgements such as the Safe Harbor-Judgement⁷⁹⁷ of the ECJ have proven that the EU may indeed increase the status of civil rights and personal liberties—thereby even limiting national governments' powers.

Agreements that have established and implemented collaborations such as the Five Eyes or other bilateral or multi-lateral forms of cooperation, however, do not provide for any safeguards for the protection of fundamental rights. Their only common aim is the collection, gathering and sharing of a great amount of intelligence information and data (thereby preventing, for example, terrorist attacks from happening). If the national control bodies are limited in their scope of review because of third parties being involved in the collection process, it becomes almost impossible to have any kind of effective control body that oversees intelligence. Therefore, from the perspective of the human rights associations mentioned above, both *C-22* as well as the *PKGr Act* do not provide for an adequate protection of fundamental rights of both citizens and foreigners.

A further question is whether states which are the main contributors to intelligence collections will indeed withhold information and stop sharing intelligence because of national oversight and review bodies of collaborating states. “The state of the art and the rapid speed at which technological innovations are developed, brought to market and disseminated, but also the extensive possibilities of modern communication in a now highly digitalised and globalised world lead to a data volume which cannot be overlooked, let alone evaluated, from a single state.”⁷⁹⁸ Nees therefore holds that the collaboration of intelligence agencies would not stop despite review bodies that are granted access to information. The German government has, however, come to a different conclusion—an assessment that was upheld by the Constitutional Court in its selectors list judgement.

From this perspective, the review of transnational intelligence sharing will only be possible under rare circumstances when the Parliament's right to get access to information exceeds the interests of the government and when the government is authorised to have the information at its disposal. Neither *Bill C-22* nor the *PKGr Act* could therefore

⁷⁹⁷ The Court ruled that the EU-US data transfer agreement was invalid, because the level of data protection in the US was not sufficient to meet the requirements of Art. 8 ECHR. *Schrems v Data Protection Commissioner* (C-362/14) EU:C:2015:650 (06 October 2015).

⁷⁹⁸ “Der Stand der Technik und die rasante Geschwindigkeit, mit der technische Neuerungen entwickelt, auf den Markt gebracht und verbreitet werden, aber auch die weitreichenden Möglichkeiten moderner Kommunikation in einer mittlerweile stark digitalisierten und globalisierten Welt führen zu einer Datenmenge, die von einem einzelnen Staat nicht mehr überblickt, geschweige denn ausgewertet werden kann.” (Translation mine).

Nees, *supra* note 22 at 680.

prevent or end the formation and existence of accountability gaps; from Nees' perspective or the perspective of the human rights initiatives mentioned above, their current versions might therefore not be seen as sufficient.

XIII. Public Information/Publicity/Reputation

What kind of influence may the new Committee and the reformed Panel have on public perception of the national security policy of the respective country? And how important are these perceptions?

As already cited in the first chapter on page 8, Gusy argues that "state tasks are no longer defined solely by the rule of law, but also democratically".⁷⁹⁹ Therefore, public opinion on the agencies, the government but also on security and privacy issues in general may be more important than ever, especially in the light of the new powers of the agencies and the possibilities that come with the digital age.

Harman states in the introduction of a book on Global Intelligence Oversight that "making oversight work depends on developing strong public buy-in. Too much of the debate is shaped by unrealistic caricatures: of the CIA, of NSA, and of Congress. Dialogue is routinely undermined by misinformation and the requirements of secrecy."⁸⁰⁰ Whereas she refers to the US American security architecture, the same may be true for the Canadian and German sphere. In the same book, Goldman and Rascoff postulate that one of the two oversight goals "should be to generate and maintain public trust in the activities of intelligence agencies [...] [and that] some degree of transparency (or at least translucency) at a programmatic level is necessary to foster accountability."⁸⁰¹ Borgs-Maciejewski mentions that the secret services are also dependent on the participation of the public,⁸⁰² highlighting the importance of public trust.

The many quotes and articles concerning public perception and necessary trust in the agencies and departments concentrating on national security could easily fill the next couple of pages. However, despite this academic focus, the questions are whether the Committee in Canada and the Panel in Germany are helping to increase this trust and whether they should actually do so. The citizens' opinions on and their perception of national security largely depend on the reports of the media and the remarks of the politicians. The majority parties therefore have some kind of power to lead the discussion about national security. This is particularly so since security and fear in general are highly emotional topics, the debate on security and intelligence being always one of the most important themes, for example, during election processes (see, for example, the election in the UK in June 2017). However, not least after the Snowden revelations, the trust in the intelligence agencies and particularly in their respect for the legal order have probably decreased. This thesis has mentioned several arguments and made several proposals that could help

⁷⁹⁹ Gusy, "Grundrechte", *supra* note 30 at 5.

⁸⁰⁰ Jane Harman, "Why Intelligence Oversight Matters" in Zachary K. Goldman & Samuel J. Rascoff, eds, *Global Intelligence Oversight, Governing Security in the Twenty-First Century* (Oxford: Oxford University Press, 2016) at xv.

⁸⁰¹ Zachary K. Goldman & Samuel J. Rascoff, "Introduction – The new Intelligence Oversight" in Zachary K. Goldman & Samuel J. Rascoff, eds, *Global Intelligence Oversight, Governing Security in the Twenty-First Century* (Oxford: Oxford University Press, 2016) at xxvi.

⁸⁰² Borgs-Maciejewski, *supra* note 34 at 41.

to rebuild the trust, for example, through minority rights in the Committee or Panel, through reports that include dissenting opinions as well as through public meetings of the control body and public hearings of the presidents of the services. As Smidt, the former employee of the BND, stated: if people do not trust the parliamentary panel (or any body of that kind), they will not trust the parliament either, and that will then also increase the mistrust in the intelligence services even more.⁸⁰³ Additionally, Borgs-Maciejewski wrote in 2006 that “no other government sector is so quickly and often confronted with terms like 'scandal' and 'failure' as that of the intelligence services.”⁸⁰⁴ And indeed, the terror attack in Manchester in May 2017 as well as the attack in Berlin in December 2016 both led to speculations whether the secret services made mistakes and might have prevented the incidents, having known about the perpetrator beforehand. Whereas in Canada the pure existence of a new Committee might already help to increase public trust in the agencies, in Germany, the new reform of the Panel has been criticised for how small its improvements are. It has also been frequently pointed out that most of the scandals had not been uncovered by the Panel (because of its limited access to information) but by the media.

However, the question is whether it should actually be the task of the Panel or the Committee to strengthen public trust in the people responsible in the realm of national security. Granted, if the control body is working effectively, this has a legitimising effect on the agencies' or departments' work, which then correlates with an improved trust of the people. However, this route to legitimisation arises from the agencies having to earn the trust through public assessment of what oversight and review processes are able to make transparent. This may be an indirect outcome of proper control but it risks distortion of the role of control institutions to expect that legitimisation should be one of their objectives. As long as the minority rights or rights of single parliamentarians in the Panel or Committee are not emphasised in *Bill C-22* and the *PKGr Act* and as long as public sanctions such as, for example, a report without revisions, do not exist, one can argue that the public has every right to be critical of the agencies—not only to put pressure on the parliament to increase the Committee's or Panel's powers but also to somehow play a part in the control of the agencies.

XIV. Effectiveness of the Parliamentary Control Mechanisms

This chapter has shown problems, opportunities and challenges of parliamentary control that the models in both Germany and Canada need to find answers to. A few arguments on what needs to be done to have an effective control mechanism have already been assessed and applied to the Committee and the Panel. We shall come back to that in chapter 4. In general, there seems to be no easy solution to how to improve parliamentary control mechanisms to have the most effective system possible.

⁸⁰³ Smidt, *supra* note 756.

⁸⁰⁴ “[...] kein anderer staatlicher Sektor wird so schnell und so oft mit Begriffen wie ‘Skandal’ und ‘Versagen’ belegt wie der nachrichtendienstliche.” (Translation mine). Borgs-Maciejewski, *supra* note 34 at 42.

However, it is not only a problem that the legislature may solve. As Born puts it, parliamentary control particularly needs effective executive control to be effective itself. “Parliament can only reliably call ministers to account for the actions of the intelligence agencies if the ministers have real powers of control and adequate information about the actions taken in their names.”⁸⁰⁵ And indeed, in practice, the German Control Panel and Committees of Inquiry had problems with the (at least alleged) ignorance of the Ministers and even the Chancellor. To mention a few examples: Merkel stated in February 2017 in a hearing before the NSA-Committee of Inquiry that she knew “nothing” about the BND spying on European and NATO institutions, politicians and foreign partners since it was up to the discretion of the Head of the Federal Chancellery to decide what to tell her;⁸⁰⁶ ministers did not know about certain practices of the BND and its collaboration with the US;⁸⁰⁷ and another example in Canada may be—as mentioned in chapter 1—Stephen Harper’s statement that he did not know about CSEC spying on Brazil’s Ministry of Mines and Energy.⁸⁰⁸ In 2016, Bündnis90/Die Grünen also argued in their reasoning for their bill to reform the PKGr Act that “the control of the intelligence services, not least through its ministerial technical supervision, was not adequately organised and carried out with sufficient efficiency, but abetted unpunished negative developments in the services and their separate lives.”⁸⁰⁹ These examples may indeed show that also executive control needs remodelling and revision in order to—at least from Born’s perspective—have the chance to support an effective parliamentary control system. The examples can, however, also be read in a different way and be considered as “plausible denial[s]” (“wilful ignorance”)⁸¹⁰. According to Shulsky, it constitutes a principle that “even if a nation’s involvement in covert action becomes known, the chief of state should be able to deny that he authorised or even knew of the action. He should be able to assert, with some plausibility, that it was carried out by subordinates who acted without his knowledge or authority.”⁸¹¹

What may be learned from these examples? Can the control bodies influence the executive in a way that makes it more obligatory for the Ministers to ask the right questions to the intelligence agencies, or are the agencies not manageable? This assumption would lead us back to the opinion mentioned in the beginning, the necessity to abolish intelligence agencies as democratically illegitimate institutions. Or does the government know about all the activities

⁸⁰⁵ Born & Leigh, *supra* note 675 at 6.

⁸⁰⁶ Robert Birnbaum, Die Kanzlerin weiß, dass sie nichts wusste“, *Tagesspiegel* (16 February 2017), online: www.tagesspiegel.de/politik/merkel-vor-nsa-untersuchungsausschuss-die-kanzlerin-weiss-class-sie-nichts-wusste/19403822.html; Andre Meister, “Live-Blog aus dem Geheimdienst-Untersuchungsausschuss: Ich sage, was ich wusste. Und ich wusste nichts.“, *netzpolitik.org* (16 February 2017), online: <https://netzpolitik.org/2017/live-blog-aus-dem-geheimdienst-untersuchungsausschuss-wurde-masseneueberwachung-seit-snowden-beendet-frau-merkel/>.

⁸⁰⁷ For example: Stefan Krempel, “NSA-Ausschuss: Ex-BND-Chef belastet Innenminister de Maizière“, *Heise Online* (14 January 2016), online: <https://www.heise.de/newsticker/meldung/NSA-Ausschuss-Ex-BND-Chef-belastet-Innenminister-de-Maiziere-3071513.html>.

⁸⁰⁸ “Harper ‘very concerned’ by Brazil spy scandal, vows follow up“, *The Globe and Mail* (8 October 2013), online: <https://www.theglobeandmail.com/news/world/harper-very-concerned-by-canada-brazil-spy-scandal/article14739556/>.

⁸⁰⁹ “[...] die Kontrolle der Nachrichtendienste v. a. durch deren ministerielle Fachaufsicht nicht angemessen organisiert war und wirkungsvoll genug durchgeführt wurde, sondern Fehlentwicklungen in den Diensten und deren Eigenleben ungeahndet Vorschub leistete.” (Translation mine). BT-Drucksache 18/8163, *supra* note 377 at 1.

⁸¹⁰ Caparini, *supra* note 753 at 18.

⁸¹¹ Abram N. Shulsky & Gary J. Schmitt, *Silent Warfare* (Washington, DC: Brassey’s, 2002) at 92, cited in Caparina, *supra* note 753 at 18.

but does not want to act upon them, is not inclined to limit the power of the agencies and departments and is not willing to protect the legal order and fundamental rights?

Conclusion

In the three first chapters of the thesis, I tried to give a neutral view of the German and Canadian models of parliamentary control and their historical backgrounds (chapters 1 and 2) as well as a (hopefully) neutral comparison of both systems—not least a comparison in the light of statements and evaluations of parliamentary control by various scholars from both countries (chapter 3). While writing this conclusion, it occurred to me that no neutral and unbiased final remarks can follow at this point.

When comparing two different constitutional states, one has to be cautious not to apply too readily rules that may be true for one state to another one. Indeed, also in the realm of national security, the constitutional architecture and the system of which control bodies form part do differ. Whereas Germany has developed unwritten constitutional principles such as the core area of executive autonomy, the protection of cabinet confidences is being highlighted in Canada. The constitutional necessity of a parliamentary control body was protected in a new article of the Basic Law in Germany. In contrast, Canada is only just about to establish a committee, and the debate has not yet focussed on the idea of its constitutional necessity in order to protect the democratic principle. However, unlike other areas of law, the realm of national security has given rise to the same political and constitutional tensions, problems and solutions in both countries. And the global world of intelligence and information sharing has led to the same debates and problems in both countries—and neither Canada's membership in the Five Eyes nor Germany's membership in the European Union or the Council of Europe prevent a comparative evaluation and assessment of *Bill C-22* in the light of the German debate.

However, when comparing and evaluating the rights of the parliamentarians and the control bodies, one needs to keep the different constitutions and constitutional rights in mind. Unless one does conclude that certain powers of the bodies are exceeding the possibilities offered by the constitution and that these powers are therefore illegitimate, those powers and rights as well as those limitations and safeguards can be evaluated differently. In fact, with respect to the Constitutions' possibilities, the evaluation of the Committee and the Panel as well as of the debate in both countries very much depends on the political opinion of the reader. If parliamentary control is considered to be constitutionally necessary, then there is a wide range of possible rights and powers for the control bodies, both constitutionally and in their concrete form. Indeed, someone might think that the minority right to write a dissenting opinion in an annual report is sufficient and necessary to have an effective control mechanism, whereas someone else might be of the opinion that a dissenting vote endangers the public reputation of the agencies. A third reader might come to the conclusion that the minority (and the majority) should be able to publicly announce their opinion(s) whenever they like to do so (however, without disclosing secret information). All opinions can be considered

constitutionally legitimate in both countries—and nonetheless, the opinion on what Canada can or should learn from the German experience of parliamentary control would differ fundamentally.

I hope that every reader of this thesis, who has read the chapters 1 and 2 on the constitutional frameworks in both countries and their peculiarities and the comparative chapter 3, will be in a position to come to his/her own substantive and well-founded conclusion and evaluation. In the following, I will give my own opinion—with which the reader can either agree or disagree.

I want to start this last chapter by referring to a very recent event in the political history of Germany, an event that occurred while I was writing these last remarks: In June 2017, the NSA-Committee of Inquiry published its final report after three years' work—including the dissenting opinion of the opposition parties (Bündnis 90/Die Grünen and Die Linke). Shortly after the Commission's announcement to make the report public (in a censored version in order not to disclose secret information), the Grand Coalition (CDU, CSU and SPD), which forms the government in Germany at the moment and is thus also forming the majority in the committees of inquiry, decided to blacken parts of the evaluation of the opposition, referring to information that should not be disclosed. *Netzpolitik.org*—an online newspaper on digital rights—has nonetheless published the full report.⁸¹² (They were able to do so, because the Chair had used an ineffectual computer program to blacken the report.)⁸¹³ One of the statements in the introduction of the opposition parties' report shall be my thematic anchor point for this final chapter on parliamentary control—and the lessons Canada should (have) learn(ed) from the German experience.

Clarification was substantially hindered and de facto hampered by a Federal Government which showed no interest in revealing, let alone reappraising and correcting clear objects of investigations, apparently legally problematic practices and co-operations of German secret services. Many secret classifications of files and events can only be explained by the degree of political embarrassment which a categorization of the classified procedure of the Federal Government would have caused. [...] The Federal Government, however, has blackened the files from the outset and most extensively, sweepingly removed them from the transmissions, and at the same time drowned the committee in badly processed files, specified classifications of files and meetings, to which the majority of the CDU/CSU and the SPD often obediently followed as a "government protection group" (Brocke, DÖV 27 2014), and constantly invented new procedures for shifting files to different places outside the Bundestag. There has been an immense number of "top secret" meetings, although it was often not clear how the content of the meeting when becoming public would ever have been able to jeopardize the continued existence of the Federal Republic. The members of the committee were frequently sweepingly accused of revealing secrets. They were threatened with criminal investigations. Representatives of the executive publicly voiced the risk of terrorist attacks resulting from the work of the parliamentary Committee of Inquiry. The partners of the German intelligence services would withdraw from the co-operations because Parliament fulfilled its mandate to investigate the long-lasting unlawful conduct of these services.⁸¹⁴

⁸¹² Andre Meister, "Geheimdienst-Untersuchungsausschuss: Wir veröffentlichen das Fazit, das die Große Koalition geheim halten will (Updates)", *netzpolitik.org* (21 June 2017), online: <https://netzpolitik.org/2017/geheimdienst-untersuchungsausschuss-wir-veroeffentlichen-das-fazit-das-die-grosse-koalition-geheim-halten-will/>.

⁸¹³ This is another example on the lack of technical expertise on the part of the watchers.

⁸¹⁴ "Wesentlich erschwert und faktisch behindert wurde die Aufklärung durch eine Bundesregierung, die keinerlei Interesse zeigte, klar untersuchungsgegenständliche, offenkundig rechtlich problematische Praktiken und Kooperationen deutscher Geheimdienste zu offenbaren, geschweige denn sie aufzuarbeiten und zu korrigieren. Viele Geheim-Einstufungen von Akten und Vorgängen lassen sich nur durch den Grad der politischen Peinlichkeit erklären, die ein Bekanntwerden des eingestuftten Vorgangs der Bundesregierung verursacht hätte. [...] Die Bundesregierung jedoch hat von Anfang an und umfangreichst Akten geschwärzt bzw. aus den Übersendungen pauschal heraus genommen, den Ausschuss gleichzeitig in schlecht aufbereiteten Aktenmassen schier ertränkt, Einstufungen von Akten und

In the third chapter of this thesis, one of the main foci was on the right to get access to information. Whereas it is obvious that there cannot be any sort of control in the absence of information, the amount of information that would need to be disclosed in order to guarantee an effective control has been the subject of debate and disagreement. Despite the importance of the debate, there is not much to add to it that has not been discussed in the last three chapters. Therefore, I will not come back to that again, except to say that in the last decades of parliamentary control—but in particular, in recent years since the NSA scandal (or BND scandal as one might call it in Germany as well)—the Panel's access to information has been scrutinised by politicians, the media as well as the courts. Also, the dissenting opinion of the opposition parties in the NSA-Committee of Inquiry focusses on the problematic lack of information and the resistant government, unwilling to cooperate to the amount necessary (in the opinion of the opposition) to guarantee for an effective control.

The new Canadian *Bill C-22* does not grant any more substantial rights to the Committee's parliamentarians than the *PKGr Act* grants to the members of the Panel (and even less compared to the parliamentarians of a German committee of inquiry). The fact that the parliamentarians of the Committee cannot subpoena witnesses and are even more dependent on a government and on agencies willing to cooperate and "grant" the Committee the information it needs, does not raise hopes of the Committee being better prepared to deal with scandals and illegalities than its German counterpart. In fact, broad and vague legal terms, powerful ministers and a dominant prime minister may decide on the information the Committee will get access to—despite the broader mandate of the Committee than that of the Panel to control the agencies directly (and not only the government itself as it is constitutionally necessary in Germany). The greater mandate will not, however, make things easier for the Committee—it will be even more dependent on the willingness of the subjects of control to cooperate, and it has an even greater duty to fulfil, i.e. more subjects to control. It seems like an impossible task when thinking of the massive amount of information flow in the digital age. *Bill C-22* does not seem to equip the new Committee with powers that correspond with the Committee's mandate, nor does it seem to have found answers that the debate in Germany has not put forward. The powers of the German Panel (and the German Committees of Inquiry) have not been extensive enough to enable

Sitzungen vorgegeben, denen die Ausschussmehrheit von CDU/CSU und SPD dann oftmals als ‚Schutztruppe der Regierung‘ (Brocker, DÖV 27 2014) gehorsam gefolgt ist, und beständig neue Verfahren erfunden, mit denen die Akteneinsicht auf verschiedene Orte außerhalb des Bundestages verlegt wurde. Es hat eine Unzahl 'streng geheim' eingestufte Ausschusssitzungen gegeben, obwohl oftmals nicht zu erkennen war, wie durch das öffentlich werden des Inhaltes der Sitzung das Fortbestehen der Bundesrepublik jemals in Gefahr hätte geraten können. Den Ausschussmitgliedern wurde mehrfach pauschal unterstellt, Geheimnisse zu verraten. Es wurde ihnen mit strafrechtlichen Ermittlungen gedroht. Dabei beschworen Vertreter_innen der Exekutive öffentlich die Gefahr von aus der parlamentarischen Untersuchungsausschussarbeit resultierenden Terroranschlägen, die die Folge davon wären, dass sich die Partner der deutschen Geheimdienste aus den Kooperationen zurückzögen, weil das Parlament seinem Auftrag nachkam, jahrelanges rechtswidriges Verhalten eben dieser Dienste zu untersuchen." (Translation mine). Germany, Deutscher Bundestag, 1. Untersuchungsausschuss, *Draft of the Fourth Part: Joint Dissenting Opinion of Bündnis 90/ Die Grünen and Die Linke*, published by *netzpolitik.org* (June 2017) at 9, online: https://cdn.netzpolitik.org/wp-upload/2017/06/2017-06-20_NSAUA-Sondervotum-Opposition-geschaerzt.pdf.

the bodies to control the activities of the government in the realm of national security. And the BND has been able to conduct illegalities for years without anyone noticing. Thus, it is more than doubtful whether the Canadian Committee is prepared for its exercise of control.

Additionally, the amount of information the Committee will have to cope with may overstrain the capacities of the Committee and its staff. Due to the amount of information, Germany established the new position of the Permanent Representative (plus staff) (which has partly been criticised; cf. chapter 3). In Canada, it is as much an absolute necessity for the Committee to have a staff that is not only high in numbers but also highly trained to deal with issues of national security. The necessity for a parliamentary control body to have an adequately funded and trained staff in order to work efficiently has been mentioned several times throughout this thesis. I have, however, not gone into detail in this regard. It would take a separate study, discussing the rights that staff members have and should have, the limitations to their powers, their specific legal positions, how to provide for their security clearances without being too dependent upon the agencies, and, in particular, how to get experts that are somehow unbiased and without experience in the agencies and governmental institutions (or would this not be considered as problematic?).

In my view, the next topic played an unduly minor role in the debates in both Germany and Canada: the minority rights of (single) parliamentarians in parliamentary control bodies as a necessary tool to ensure the effectiveness of the control activity. The above-mentioned report of the opposition groups of the German NSA-Committee of Inquiry can very well serve as an example of effective control in terms of the execution of minority rights. The report shows a view of the NSA scandal and the BND's role in it different from that of any media article or parliamentary debate and it particularly differs from the opinion of the majority government parties. Without judging who is right, in order to arrive at a position to develop its own point of view and, in the end, an objective picture or solution, the public needs to listen to both sides of the story—in particular in the light of upcoming elections and the chance to either support the government or penalise it for losing control over the agencies or willingly let them act without controlling or supervising them.

Indeed, in order to have an effective parliamentary control, it has to be ensured that the public gets informed—not only by government party members but also by members of the opposition. In Germany, this is even more important as many parliamentarians are elected because they are highly ranked on their party's state lists for the next elections. If a parliamentarian of a governmental party thus chooses to (publicly) criticise the government (in terms of national security laws, policies and the agencies' activities), the MP may very well expect that he/she will not be getting enough support for a promising place on the state list for the next election; he/she will thus not be re-elected if he/she is not elected as a direct candidate in his/her constituency. It is thus quite easy for the parties to execute pressure on the parliamentarians. One might call the minorities' interests "partisan" and parliamentary groups of the opposition may also have an interest in publicly "shaming" the government. However, it is as much true that they do not have to be

worried about their seats in parliament if they speak out against the government and the agencies' activities. Thus, they may speak more freely and truthfully than the parliamentarians of the majority parties who must fear the consequences of their courage.

Minority rights may thus very well be one of the few possibilities of providing for an effective parliamentary control in the realm of national security. The NSA report mentioned above is one example of this kind of "opposition control" that would also be an important factor in Canada to establish an effective parliamentary control—something that is far from being reached if one has already granted the Prime Minister the power to veto or revise the annual report of the Committee. Bill C-22 nearly renounces all rights of the opposition or of single parliamentarians in the Committee. Whereas the members of the Committee do have to come from different parties, the Committee's work will very much be dependent upon the work and opinion of the Senators who are not members of one specific party. It is, however, doubtful that the role of unelected politicians can be considered as effective minority rights in terms of democratic aspirations in the realm of national security control.

One might thus call for more minority rights, such as the possibility to go to court (as a minority) against the government (for example if it does not provide the Panel/the Committee with sufficient information; a power that is explicitly excluded in *Bill C-22*) and other rights that were partly mentioned in chapter 3. However, it is indeed problematic that the minority (even if including the Senators in Canada) might have even more difficulties to deal with the amount of information that is being collected in the digital age due to their independence from the government and the low number of their parliamentarians (and of independent senators). A control that starts to take effect on the lowest possible level, thus a control that may also protect individual citizens' rights, seems impossible considering how easy it has become particularly for the agencies to access personal information in the digital world. Whereas this problem is dealt with by the G10 Commission in Germany, the Committee in Canada might soon after its establishment be overwhelmed by the amount of information that is being collected and that—in general—is considered as falling within the scope of the new mandate of the Committee.

A more reasonable approach might therefore be an attempt to establish control that takes effect on a level that is much more abstract than the focus on individual rights. One example might be to make the Committee or Panel decide on which method should be adopted by, for example, the agencies to collect information. Indeed, as mentioned in chapter 3, private companies are nowadays able to collect digital information of all users—thereby making it possible to draw a complete picture of each individual client. Therefore, every kind of co-operation or collaboration of the agencies or the government with those companies should need a permission from the Panel or the Committee. The same obligation should be necessary for collaborations with foreign agencies—although it would lead to further problems if the Panel/Committee had only to agree on a collaboration once for an indefinite amount of time. As this would constitute a "carte blanche" for the government, a regular half year review of the agreement or the like would

be needed as well. However, even then, the question how to deal with old agreements that were not signed under those conditions would remain. The Five Eyes agreement is an arrangement that seems to make any form of review or oversight control nowadays nearly impossible. In Germany, the *selectors list* judgement of the Constitutional Court has shown that there is no effective control possible when it comes to foreign agencies and the collaboration of national and international secret services. *Bill C-22* does not seem to provide any solution to this problem. This may very well make the work of the new Committee impossible in the nearest future. It does not seem to have found answers that Germany has been missing and will thus stumble over the same problems as the German parliamentary control bodies did in the past. A depressing outlook on a Committee that has not even been established . . .

As just mentioned, the amount of information the intelligence services might have access to (by illegal or legal means) has grown significantly through private companies that gather information on the electronic behaviour of their users. Even if one excludes individual control and focusses on general control, it is not illusory that in the near future, artificial intelligence will be able to fully analyse the information and create a full picture of the respective human being. This may lead to a power of the intelligence and secret services to get information on an individual that has never been conceivable before. How should an abstract and general control by a single body then still be effective—or even possible? Since artificial intelligence will not only use specific algorithms but in the future is supposed to even “think” on its own, parliamentary control of anything but results will not be possible the way it is executed at the moment. Neither the debate on the Committee nor that on the Panel nor any other (academic) debate that has been led in the last years in either country has concentrated on this problem. However, it will—sooner than later—complicate the (already doubtful) efficiency of parliamentary control even more. The public, a leading force—as chapter 3 emphasised—for changes in the realm of national security, does currently not seem to force the political institutions in either Canada or Germany to address these issues and the new problems of the digital age.

Another layer of protection of fundamental rights in Germany is being provided for by the European Union, particularly the ECJ. The latter has, especially in recent years, focussed on the fundamental right of privacy and has thus brought some limitations to mass surveillance and unlimited governmental access to individual data, for example, through the prohibition of unfounded retention of data.⁸¹⁵ These kinds of additional safeguards are missing on the Canadian side. One may thus argue that fundamental minority rights in Canada are of even bigger importance than in Germany.

In my opinion, to concentrate on the dangers of mass surveillance and the future threats to privacy and individual rights by artificial intelligence should be a task for both the Panel and the Committee. Why can't this be part of the mandate of the control body? The bodies should also have the duty to make the citizens aware of the consequences of the increasing data collections and the encroachments upon fundamental rights. The governments seem reluctant

⁸¹⁵ *Tele2 and Watson*, European Court of Justice, Joined Cases C-203/15 and C-698/15 (Grand Chamber).

to do so in order to (also) be able to cooperate with foreign services and governments without limitations. But cannot one argue that it is the duty of a body to highlight its importance—to, in a way, conduct marketing for its own work? Only the public and the pressure of concerned citizens can lead to a change in terms of parliamentary control. In my opinion, any future debate should thus also focus on the role of the parliamentary control bodies by making sure that the public understands their work and the necessity of their work. The bodies themselves need to elaborate on and evaluate the role they can and need to play in times of digitality and artificial intelligence.

Another point that I want to address is the lack of sanction possibilities in both *Bill C-22* and the *PKGr Act*. As mentioned in chapter 3, the Canadian Committee will likely not have any sanction powers apart from the whistle-blower clause (that is not drafted as a minority right). In Germany, due to the lack of sanction powers, the government has long been in a position to not even fear the withholding of information. This offense had no consequences (apart from a few admonitions in reports) and was part of every major scandal and process of political investigation in the realm of national security in the last years. The German reform has recently made a few changes to the *PKGr Act* to increase the powers to sanction, such as the possibility of the Panel to question the presidents of the intelligence and secret services. However, there are—in my opinion—not enough possibilities to sanction a government that goes beyond its constitutional competences.

A further possibility to increase the democratic accountability of the services could be the rule that the presidents of the services need to be elected or at least confirmed by a high parliamentary majority (to make sure that they work impartially and independently). Additionally, it should be possible to remove the presidents from office. This may, however, be difficult for two reasons. Firstly, it may be constitutionally illegitimate in Germany as the government has to be the subject of control and not the agencies themselves, and secondly, —this is true for both Canada and Germany—this power of the parliament might be considered as an encroachment upon the core area of executive autonomy, the principle of the separation of powers or the powers of the cabinet. But why are there so many exceptions to the general constitutional rules in the realm of national security, but no exception when it comes to the executives' respective powers? Fundamental rights are limited because of the “threat of terrorism”, broad excuses with respect to terrorism and security are brought forward and the powers of the parliament and the public are severely limited in the realm of national security.

In general, the parliament is considered responsible for the control of the executive, the parliamentarians are supposed to have an equal access to information, and the public is meant to be informed transparently and openly. But all this does not apply to the realm of national security. Instead, small committees or panels, which may only receive information after occurrences and only on the “discretion” of the government without any true powers to sanction it, are trying to effectively control a whole “state” and an “administration” of various agencies with different powers, mandates and (illegal) activities. The parliamentarians of the Committee or Panel get to know information that no

other parliamentarian is granted access to, but they are not able to make use of their “normal” parliamentary rights. As for equality between parliamentary groups and parliamentarians, it is unsettling that not even all parliamentary groups of the Bundestag or the House of Commons need to be represented in the Panel or the Committee. What about the equality of parliamentarians and parliamentary groups and, in particular, the election principles for the parliaments? Why is it apparently impossible to take on a ‘more for more’ approach? If the agencies or the government receive rights that—in general—contradict major constitutional rights and principles that form the basis of a democratic state that is governed by the rule of law, is it then sensible to strictly ensure that the executives’ powers are not limited or restricted somehow?

Reflecting on the last decades of (parliamentary) control in the realm of national security in both Germany and Canada, it becomes obvious that the period was accompanied by major scandals and illegalities by the agencies, by the unwillingness of the governments to cooperate with the control bodies and by new digital possibilities that made the control not only harder and more difficult but also poses questions that no one is yet willing to address or answer. Looking at the current reform in Germany with its new limitations to parliamentary control⁸¹⁶ and analysing the new Committee in Canada⁸¹⁷ the question I am posing is whether the reform or the establishment of a new institution are actually trying to address the problems that parliamentary control faces or whether their true aim is different: to increase the impression of legitimacy of the agencies and the government and, thus, the powers of the government in the realm of national security.

Currently, *Bill C-22* does not seem to have found answers that Germany had not implemented before. Instead, the German lesson that no parliamentary control can be effective without a proper access to information and the possibility to sanction the government (as it became apparent in the BND/NSA scandal) has not yet shaped Canadian attempts to create a new control body. The new model has not taken over the ideas and proposals in this regard that were already put forward in Canada forty years ago and has also not learned from the experiences of parliamentary control of other countries in the last decades.

Bill C-22 does not address the issues of international information sharing and the lack of control thereof, as well as the problems of the new digital era but sticks to proposals that were made forty years ago. And, *Bill C-22* does not provide for any ideas on how to protect the citizens’ rights. If there is indeed a lesson to learn from the German experience: it lacked effectiveness. Instead, most scandals and illegalities have originally not been under scrutiny of the parliament—due to its ignorance. Additionally, the rights and powers of the Panel would probably also not be quoted as an example for sufficient control powers—the minority is calling for more rights, the government is trying

⁸¹⁶ Such as the fact that the Chair will likely not rotate anymore between the opposition and the majority, the unwillingness of the government to cooperate and the illegalities committed by the BND that only led to an increase of its powers.

⁸¹⁷ (with its limited powers and access to information and the leading powers of the Prime Minister).

to keep the powers limited with the help of tactical political manoeuvres (such as not publishing dissenting opinions and adjourning the hearing of the presidents of the agencies). The shaping of the Panel that does not need to integrate all parties in the Bundestag and that, for example, will not provide for a rotating minority and majority chair anymore should also not be taken as a model without hesitation. Thus, the main lesson to learn from the German experience is probably something that Canada can still vote for: to be open and willing to hold the debate over years, to be open and willing to reform the Committee time and again—in the light of new developments—and—last but not least—to not lose sight of the aim to protect and provide for democratic legitimacy in the realm of national security. Parliamentary control may be one of the key solutions for an adequate protection of everyone's fundamental rights even in the digital age:

Anyone who is afraid that his/her communications are being monitored may also be afraid to express his/her opinions openly, to seek free access to information, to visit a political meeting, to seek medical, legal or pastoral advice or to contact the press to draw attention to grievances. If the human right to privacy is at risk, the right to freedom of opinion and information, the right to freedom of assembly and association, the right to health, the right to freedom of religion and the right to a fair trial may also be threatened.⁸¹⁸

⁸¹⁸ “Wer fürchtet, dass seine Kommunikation überwacht wird, fürchtet vielleicht auch, seine Meinung offen zu äußern, freien Zugang zu Informationen zu suchen, eine politische Versammlung zu besuchen, ärztlichen, anwaltlichen oder seelsorgerischen Rat einzuholen oder sich an Vertreter der Presse zu wenden, um auf Missstände aufmerksam zu machen. Ist das Menschenrecht auf Privatsphäre in Gefahr, können auch das Recht auf Meinungs- und Informationsfreiheit, das Recht auf Versammlungs- und Vereinigungsfreiheit, das Recht auf Gesundheit, das Recht auf Religionsfreiheit und das Recht auf ein faires Verfahren bedroht sein.” (Translation mine). Deutsches Institut für Menschenrechte, *supra* note 794 at 4.

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